United States Court of Appeals

FOR THE EIGHTH CIRCUIT

No. 15,548

CIVIL.

FIRST IOWA HYDRO ELECTRIC COOPERATIVE, F. A. E. GILLMOR, HARRY J. STRONG, AND HARRY IMEL, APPELLANTS,

vs.

IOWA-ILLINOIS GAS AND ELECTRIC COMPANY, IOWA POWER AND LIGHT COMPANY, IOWA SOUTHERN UTILITIES COMPANY, INTERSTATE POWER COMPANY, UNION ELECTRIC POWER COMPANY, KANSAS CITY POWER AND LIGHT COMPANY, IOWA ELECTRIC LIGHT AND POWER COMPANY, NORTHWEST LIGHT AND POWER COMPANY, WISCONSIN POWER AND LIGHT COMPANY, IOWA PUBLIC SERVICE COMPANY AND IOWA UTILITIES ASSOCIATION, APPELLEES.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF IOWA

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[fol. 2] Abstract of Evidence and Proceedings

1. Hearing Before Judge Riley on Order for Rule to Show Cause on Motion to Quash Appearance of Bell, Farrar & Scott. September 2, 1955.

In response to question by Plaintiff Strong as to whether petition of plaintiffs to intervene filed September 2, 1955 had been acted upon, Court stated (Tr. 2-3):

"It is unnecessary for you to petition to intervene in this cause, because you are already a party to it. I will consider everything that is contained in this as a resistance to the motion to quash the appearance, but being already parties to the case it is unnecessary for leave to be granted you to intervene. You are already in the cause."

2. Hearing Upon Motion for Leave to Remove France, France & Nady and James R. McManus and Allan R. Shepherd as Attorneys for Plaintiffs. October 3, 1955.

Mr. McManus stated that France, France & Nady and James R. McManus and Allan R. Shepherd were present in person and as attorneys of record for the plaintiffs and objected in both capacities to the proceedings before the Special Master on the ground that the order of appointment was void under the Fifth and Seventh Amendments (Tr. 6-7).

The Master overruled the objection and stated that (Tr. 9):

"The objection, if good, would also appear to be premature."

Mr. McManus requested a continuance in the proceedings to investigate the proceedings in the Court of Appeals

by plaintiffs "because of our interest in the subject matter of this litigation" (Tr. 17). He stated that he desired the continuance "so that we can protect our rights by contesting the appearance of any lawyers purporting to represent these plaintiffs without our knowledge in the Circuit Court of Appeals for the Eighth Circuit" (ibid.).

[fol. 3] On direct examination by Mr. McManus, JOSEPH P. CONDON testified that he and others had turned over the sum of $10,000 to Mr. Jake More on representations of plaintiff Strong that the money would be used to pay Mr. McManus and Mr. X. C. Nady $5,000 each (Tr. 23-24). In response to the question "When did you first become aware Mr. Strong was using some of this money for his own needs?" Mr. Condon stated:

"When you didn't get it. Mr. More told me he didn't want to pay the lawyer. I don't know whether he used it for his own means or not, but you didn't get it, that's all" (Tr. 27).

Mr. Condon answered in the affirmative the question [illegible] do you desire that the $15,000 that you and Mr. [illegible]er and Mr. Drexler turned over to Mr. Strong be deposited in the registry of this Court to be used for the purposes that you gentlemen originally intended it to be?" (Tr. 29).

MR. NADY testified that (Tr. 60):

"The terms of our employment, that he would not be able to pay us fully as we went along in the litigation but that we would have sufficient money to maintain us and pay us what was necessary for our expenses, office expenses and overhead, during the time that we were to spend the great part of our time to this litigation, and I later entered the meeting where Mr. Strong reported that to the Board, and I think there are minutes in that Board where we were employed on a contingent basis, subject to being paid a reasonable amount as we went along."

[fol. 4] He further testified that he had performed extensive legal services and made out-of-pocket disbursements on behalf of First Iowa Hydro Electric Cooperative and the individual plaintiffs, and stated as follows (Tr. 66):

"Taking into consideration the responsibility assumed in a case of this size and the various legal problems to be met, and the work to be done, it is my opinion that our services—the services of our firm are worth a hundred thousand dollars to date."

Mr. Nady also testified with respect to the funds allegedly obtained from Mr. More that Mr. Strong had stated to Mr. Nady "that he had told Mr. More that he had raised the additional money required as a condition upon his making payment to us, but in fact he had not raised it, and that he had lied to More in getting possession of the money" (Tr. 67).

Mr. James D. France testified that he believed the services of France, France & Nady to date had been worth $100,000 (Tr. 73-74) and that the services of McManus and Shepherd had been worth a like amount (Tr. 75).

Mr. Allen R. Shepherd also testified that a $100,000 fee for the services of McManus and Shepherd would be "fair" (Tr. 90).

3. Proceedings in re Taking of the Deposition of Harry J. Strong, October 10, 1955. Transcript, Vol. 31.

Plaintiff Strong made the following statement: (Tr. 1934)

"Mr. Master, I am Harry J. Strong, Plaintiff, the witness called in this deposition.

"I am here unrepresented by counsel.

"The Court has been on notice since September 2nd, that we have discharged our counsel.

[fol. 5] "The Court has seen fit to freeze us in that position, and under those circumstances, and without counsel, I am going to decline to testify further.

"I want the record to show that there was filed in the Court this morning at 9:35 A. M., an affidavit of prejudice.

"I wish the record to further show that we request that any further action in this case be deferred until that matter is disposed of."

The Master advised Mr. Strong to testify and Mr. Strong declined (Tr. 1935). The Master advised Mr. Strong that "You may be held in contempt for refusal to testify." Mr. McManus then stated as follows (Tr. 1935):

"Let the record show that J. R. McManus and X. C. Nady, attorneys of record for the Plaintiffs in this proceeding are here and ready to proceed."

Mr. Strong then left the hearing room. Mr. Larned Waterman, one of the defendants' counsel, stated that Iowa-Illinois Gas & Electric Company would seek the sanctions provided by Rule 37. Mr. McManus then stated (Tr. 1935):

"That may be part of the strategy, I do not know."

4. Proceedings in re Deposition of Harry J. Strong, October 10, 1955. Transcript, Vol. 32.

In a colloquy concerning the Motion to Dismiss filed by the defendants on October 10, 1956, Mr. McManus requested maximum time to respond to the Motion (Tr. 1944). The Master replied that the grounds of the motion were "fairly simple" (Tr. 1945). In response, Mr. McManus stated (Tr. 1945):

"I am not talking about the grounds, I am talking about the fact that you have a $40 million lawsuit here, which is apparently being controlled, as far as the plaintiffs are concerned, by one man, and if this motion were

[fol. 6] sustained it could result in a summary dismissal of this lawsuit.

"I think in view of that situation, you should afford in the interest of justice ample time and opportunity for the plaintiffs and their counsel of record to resist the motion, and for that reason you should afford ample time."

5. Proceedings Before Special Master on Order to Show Cause. October 28, 1955.

Mr. McManus objected to the jurisdiction of the Special Master on the ground that his appointment was unlawful, constituted an abuse of discretion, and deprived plaintiffs and their attorneys of the Constitutional rights of a jury trial and due process of law under the Seventh and Fifth Amendments respectively (Tr. 2). The Master overruled the objection but stated (Tr. 3):

"If you care to take further part in the proceedings, why, that can be done without prejudice to the objections you have asserted."

Mr. McManus stated that none of the plaintiff's attorneys of record was consulted before the filing of the various papers mentioned in the Master's proposed Order attached to his Order of October 24, 1955 (Tr. 5-6). He also stated that (Tr. 6):

"And we haven't been instructed or requested by our clients, the plaintiffs, to make any resistance to any of these matters that appear on the first page of Exhibit 'A' attached to the Special Master's order of October 24th; nor have we been asked to present or bring the attention of the Special Master to any of the motions or the resistance that's mentioned on the first page of Exhibit 'A'."

[fol. 7] 6. Transcript of Proceedings prior to Argument on Motions to Dismiss. November, 18, 1955.

Plaintiff Strong noted an appearance (Tr. 3). Mr. Strong made the following statement (Tr. 5-6):

"Mr. Master, I would like to have the record state that on September 1, 1955 the First Iowa Hydro Electric Co-

operative and five individual plaintiffs, including myself, discharged the attorneys of record, having lost faith in that counsel. And we still have lost faith. We believe that since the 2nd day of September, when the Court was given notice of that action, the Court has seen fit to freeze us in a position where we have been unable to get counsel. I would like to have the record show that on Monday of this week I appeared before the Special Master, personally, and because of the orders of this Court or the Master refuses me, as an individual, or any of the other individual plaintiffs, the right to file anything in Court, and directs the Clerks of Courts not to receive anything, that I have attempted all week to get counsel to make an appearance, as is provided for in the order of the Master, to clear the way to where we can get counsel of our choosing. I have been unable to do so. It is our opinion we will be unable to get any Iowa attorney or attorneys in this judicial district to handle this matter. I will continue to pursue, as an individual, the effort to get counsel of my choosing —one whom we will have faith in. I feel that I have every right that any counsel could give me, in appearing in this or any other court of this United States."

[fol. 8] The Master sustained objection of Mr. Walker to any appearance by Mr. Strong (Tr. 6). Following the ruling, Mr. Strong stated (Tr. 6-7):

"I should like to have, Mr. Master, the record show that certain allegations were made—and made before this Master and this Court—that were heard by this Master, and which were made under oath and verified, and in which the record will show there was not one word of contradiction to those allegations. And those allegations went to the misconduct of counsel. And the record will show that the Court has completely ignored those allegations. The attorneys of record made not one word of record denying them and, therefore, that record stands and this Court has the responsibility that if and when something is made under verification and under oath, as an allegation, and not denied, it stands as the law that they are guilty of misconduct. The Court has seen fit to disregard that. The wisdom of the attorneys, of course, is far greater than mine as a layman. They saw fit to ignore it. For that reason I want this

objection to show in the record, in behalf of myself as an individual, that it is not a good order, nor is it in conformance with any law; and the responsibility rests upon this Court to protect the individuals, and particularly the plaintiffs, when they are without counsel. If that is the ruling of the Master I shall retire from the room."

The Master ordered that (Tr. 7):

"All statements made by Harry J. Strong in the course of this hearing, except the fact of his presence here, will be stricken from the record and will be given no effect."

[fol. 9] 7. Proceedings in re Deposition of Harry J. Strong December 20, 1955. Transcript, Vol. 33.

Mr. Shepherd objected to the jurisdiction of the Master (Tr. 1960). The Master ruled as follows (ibid.):

"The objection is overruled.

"Your participation in these proceedings will be understood to be without waiver of the objection." Mr. Strong made the following statement (Tr. 1964-1967):

"Mr. Master Doerr, I wish to make a statement before this hearing and for the record.

"I was called and appeared on October 10th to continue giving testimony in this deposition and declined to testify under my constitutional right of having counsel with me in whom I have faith and trust.

"The Court has been on notice since September 2nd that we discharged the attorneys of record, namely: France, France & Nady and J. R. McManus and Allen R. Sheppard.

"The Court knows we filed under oath allegations of misconduct; answer was made by these attorneys, not under oath. A hearing was held and these attorneys had their opportunity to deny the charges, but not one word appears in the transcript of denial; therefore our charges stand as proved.

"Without one single word of denial of this misconduct, you, Mr. Master, found there is no misconduct. That mat-

ter has been appealed to the 8th Circuit Court of Appeals. [fol. 10] I say now, it is up to the Appeals Court to dispose of that matter before it can go any further.

"Later in this very room and before you, Mr. Master, while you were presiding and in session, you brought up the question of my being cited for contempt of Court—the attorneys for the defense objected to my being cited—yet, and I am sure it is discharged attorneys, an attorney this court will not let us discharge, suggested to you, Mr. Master, that I should be cited quote, 'that may bring this boy to his senses' end quote. That is not in my best interest.

"Other of our discharged attorneys were present, heard this and did not say one word; thereby their silence was not defending my best interest. Their silence was complete acquiescence to what Mr. McManus said—that I should be cited for contempt of Court.

"Does anyone believe I should be compelled to give testimony in this Court without attorneys in whom I have trust and faith?

"As to the $2500 that the Court has ordered us to pay—to carry the costs of taking this deposition, I want it known that I purchased a bank check for the $2500 on September 28, 1955, then I called my associate plaintiffs to advise them. They insisted that I get legal advice as to the propriety of paying in this money.

"It was our understanding the Court ordered the Union Electric Company to pay all the costs. Without our knowl- [fol. 11] edge the attorneys we had went before the Court asking that this Utility pay them a fee while this deposition was being heard. I understand the Court denied same.

"In this very room Mr. Bergstrom, the expert in anti-trust law, said he was the one who got the words 'office rental' into the order, and therein lays the grounds for the Court to come at us to put up the $2500. This, too, has been appealed and should be disposed of before this Court can or should go any further with this particular matter.

"I say to you, we do not want this case dismissed because of our failure to pay into the Court the $2500. We do not have the $2500. What money as would be available,

and I say to you if we had our funds today, I would pay the $2500 into the Clerk of Court, but under protest.

"Our funds in the amount of $5,081.81 were improperly ordered turned over to a receiver in an involuntary bankruptcy case in this same Court (being Case No. 1-177) that money did not belong to the First Iowa Hydro Electric Cooperative. The Court knew this and ordered me to be put in jail—and I was put in jail until our attorney, in that case, turned the money over to the receiver.

"The Court was advised I turned this money over voluntarily to the attorney in that bankruptcy case, No. 1-177, on November 12, 1955, and I was put in jail on the 29th.

[fol. 12] "Our attorney advised me that I could not go to jail, that if I was cited, all that it took to purge the contempt was to turn it over, that the Court would have to hold a hearing or show cause, before anyone could be jailed. I was in jail. They say it can't be done, but I was there. I ordered the attorney to turn over the money, three days before I was jailed. The attorney for the receiver was fully advised of all this.

"This same attorney told me Judge Riley could be held personally liable for putting me in jail and not giving me a hearing.

"We were declared not bankrupt by the jury after two days of trial.

"This tangent case of bankruptcy has become a part of our lawsuit as here being heard. Our money is tied up until it is returned, if the funds are returned we will pay the $2500 into the Court.

"I cannot see how this Court with one hand can take our funds away from us and with the other hand say, pay $2500 or the main lawsuit will be dismissed.

"Again I say to you, Mr. Master, this whole thing has been appealed, notice of such appeal was made on November 26th, the filing fee was paid, and the bond has been furnished.

"The matter is from the moment of that Notice of Appeal being read by the Clerk of Court out of the juris-

diction of this Court, and I cannot understand the persistence to ignore it and continue on as if it were not filed.

[fol. 13] "Under the circumstances of the Court suppressing so much of the record that it is impossible for me to fully acquaint any attorney so he can come into this Court and properly protect my interests, and being without counsel of my own choice and in whom I have trust and faith, I believe I would be justified in refusing to testify.

"Therefore I stand upon my constitutional rights and ask that I be excused from testifying until I have counsel of my own choosing and in whom I have faith. I do not have faith in the attorneys here presuming to represent me.

"Your Honor, if you compel me to go on the witness stand, I am going on. I do not want to be in contempt of this Court, and I don't want to spend Christmas in jail. I ask that I be excused from testifying until I can get attorneys of my choice, and in whom I have faith while I am testifying on the witness stand."

The Master stated that Mr. Strong had "not been threatened with contempt procedure so far as I am aware in connection with these discovery deposition proceedings" (Tr. 1969). He denied the request that Mr. Strong be excused from testifying and instructed Mr. Strong to submit himself as a witness (ibid.).

Thereafter Mr. Strong again refused to testify "under my Constitutional rights, and not having an attorney present in whom I have faith and confidence" (Tr. 1975). The Master ruled that:

"The case for all practical purposes stands dismissed now as to Harry J. Strong and First Iowa Hydro Electric Cooperative.

[fol. 14] "The Supplemental Order will merely confirm that situation" (Tr. 1977).

8. Proceedings on Deposition of F. A. E. Gillmor, January 10, 1956.

Plaintiff Gillmor made the following statement at the opening of the hearing (Tr. 10-11):

"Gentlemen, I have been called to testify, and, Mr. Doerr, I am F. A. E. Gillmor, President of First Iowa Hydro Electric Cooperative. I wish to make a statement before this hearing and for the record.

"I am called here to give testimony when the case of the First Iowa Hydro Electric Cooperative stands dismissed by Master Doerr as per his order of December 22, 1955. The matter is now before Judge William F. Riley for his ruling on such dismissal and should be disposed of before any further proceeding, as is here and now contemplated.

"I and the other plaintiffs, discharged the attorneys of record for misconduct and the Court has been on notice of such action since September 2, 1955.

"The Court prefers to change our motion to remove the attorneys to one of substitution and improperly ruled accordingly.

"That matter is before the Circuit Court of Appeals and we feel confident it will be reversed. Also, the qualifications of this Master and his appointment will be before the Court of Appeals; that, too, I feel will be undone.

[fol. 15] "The appointment of the previous Master, Wayne Cook, will be before the Appeals Court; our showing of him, as in our opinion, being a chief counsel of the defendants deserves to be corrected.

"I, being without [consel] of my own choosing, with this Court's action making it impossible for me to get counsel in whom I have trust and faith—with this Court trying to compel me to give testimony with counsel in whom I have lost confidence, faith and trust, and knowing we have discharged those who presume to represent me, I will stand on my Constitutional rights and ask that I be excused from testifying."

The Master denied the request that Mr. Gillmor be excused from testifying (Tr. 11).

Mr. Gillmor stated of the plaintiffs' attorneys of record that they were "willing to sell us out and not work in our best interest" (Tr. 12) and he refused to testify.

Mr. McManus then made the following statement (Tr. 12):

"You just said that your attorneys are trying to sell you out. Do you have any evidence to substantiate or back up the statement that you made; because you are going to be given an opportunity to tell it to the Polk County Grand Jury very soon. So you had better be getting ready. If you have anything to say, I invite you to tell these gentlemen what you know to back up the statement you just made."

[fol. 16] 9. Proceedings on Deposition of Carl J. Mitzner. January 16, 1956.

Mr. McManus objected to the jurisdiction of the Special Master on the same grounds urged previously (Tr. 6-7). The Master ruled as follows (Tr. 7):

"The objection will be overruled. Your participation in the subsequent proceedings here will be without prejudice to that objection."

The Master stated as follows with respect to his prior order conditionally granting leave to plaintiffs to remove their attorneys of record (Tr. 60-61):

"There is no judgment against your Cooperative. There is no judgment against any individual plaintiff for that or any other sum as attorneys' fees.

"The sum is fixed only in relation to your own motion for privilege to discharge your attorneys. That privilege has been granted on condition that you pay their fees in the sum of $200,000, which was substantially the only figure mentioned in testimony at the hearing with relation to the discharge of your attorneys.

"That hearing was one which none of the plaintiffs attended."

Mr. Mitzner then made the following request (Tr. 61):

"Well, in thinking that over, your Honor, it just seemed to me only right and proper to ask you and the Court or state to you the privilege of examining into my ability to pay my share of that amount that has been stated as owing to these attorneys."

[fol. 17] The Master denied the request, it was repeated by Mr. Mitzner, and again denied (Tr. 61).

10. Proceedings Before District Court on Motions to Dismiss, etc., January 20, 1956.

In the course of the argument on the pending motions to dismiss the complaint, Mr. McManus responded as follows to a question from the Court as to suggested remedies for Mr. Strong's alleged misconduct other than dismissal (Tr. 34-35):

"I will have to confess that I myself am unable to explain or to justify Mr. Strong's conduct on any reasonable or rational basis. I have not talked to Mr. Strong since the 31st day of August of 1955. As everybody knows in this room, there has been a dispute between counsel of record and the plaintiffs in this case, especially Mr. Strong, but recently that situation has changed with respect to Mr. Imel, Mr. Mitzner and Mr. Naber, so that Mr. Mitzner and Mr. Imel and Mr. Naber have counselled with us this week as late as Tuesday, and apparently Mr. Strong is going down the same line that he has gone all along, by himself, but it has become increasingly apparent that the other directors are getting next to Mr. Strong, shall we put it."

He added the following (Tr. 35-36):

"The Special Master, Your Honor, as I understand the law, possesses no power to commit a person for contempt of court. That is only a power vested in the district judge, so that the only sanction that he could apply on the motion [fol. 18] and the record that was made before him was to sustain or recommend the sustaining of the motion to dismiss filed by the defendants because of his refusal and failure to testify, and his failure and refusal to put up the $2,500.

"Now, in a discussion of this kind I must be fair and honest and frank with the Court, that I am of the opinion that at all times they had the money to put up the $2,500,

so that I don't know of any justification or excuse for the failure and refusal of First Iowa Hydro Electric Cooperative to make the $2,500 deposit into the registry of this court under the order that the Court has made, and I don't intend to attempt to justify that because the records of this court show that during the bankruptcy proceeding they produced in the neighborhood of $5,000. I am told, although I know it only by hearsay, that that $5,000 that was deposited has been released and is in the hands of the lawyers who represented the First Iowa Hydro Electric Cooperative in the bankruptcy proceedings."

Mr. McManus further stated:

"We have advised all of these plaintiffs to testify and have requested them to testify, so that if this case is dismissed it penalizes the lawyers who are innocent of any wrongdoing" (Tr. 37).

During further discussions with the Court Mr. McManus stated that he would "not attempt to explain or to justify or to excuse the conduct of Mr. Strong" (Tr. 38). Of Mr. Gillmor, he said (Tr. 38):

[fn. 19] "Mr. Gillmor is a very old man who is under the domination of Mr. Strong and who is being led by Mr. Strong. If left to his own devices I am certain that Mr. Gillmor would do what was right. He is a high minded old gentleman possessed of his ideals, but he is being influenced and led by Mr. Strong, so that Mr. Strong by his wilfull conduct is penalizing the other four directors and the attorneys of record for the plaintiffs, so that I ask the Court to devise some means to keep the law suit in court in order to afford us time and opportunity to try to get the situation straightened out."

When the Court stated of Plaintiff Strong that "He has been guilty of contumacious conduct as one could possibly be guilty of" (Tr. 39), Mr. McManus replied: "I agree with Your Honor" (Ibid.).

[fol. 20] Complaint.

(Filed in U. S. District Court on February 18, 1954)

In the United States District Court for the Southern District of Iowa, Davenport Division.

First Iowa Hydro Electric Cooperative, F. A. E. Gillmor, Carl J. Mitzner, Harry J. Strong, Harry Imel, and P. H. Naber, Plaintiffs,

No. 1-224. vs. Civil Action.

Iowa-Illinois Gas and Electric Co., Iowa Power and Light Co., Iowa Southern Utilities Co., Interstate Power Co., Union Electric Power Co., Kansas City Power and Light Co., Iowa Electric Light and Power Co., Northwest Light and Power Co., Wisconsin Power and Light Co., Iowa Public Service Co., Iowa Utilities Association, Defendants.

[fol. 21] Come now the plaintiffs and for cause of action state:

1. That the jurisdiction of this Court to hear this complaint is based upon the ground that this Court has original jurisdiction of suits and proceedings arising under any United States law to protect trade and commerce against restraint and monopoly and, as hereinafter set forth, this [fol. 22] controversy involves violations of Sections 1, 2 and 7 of the Act known as the Sherman Anti-Trust Act, as amended (15 U. S. Code, Section 1, et seq.), and Sections 1, 4, 5 and 7 of the Act known as the Clayton Act, as amended (15 U. S. Code, Sections 12, 15 16 and 18).

2. That the plaintiff First Iowa Hydro Electric Cooperative is a cooperative association organized under and by virtue of the provisions of Chapter 390 G 1 of the 1935 Code of Iowa, on the 10th day of June, 1938, with its principal place of business at Muscatine, Iowa. That the plaintiffs, F. A. E. Gillmor, Carl J. Mitzner, Harry J. Strong, Harry Imel, and P. H. Naber, and each of them, are citizens of the State of Iowa and each and all of said plaintiffs bring this action on their own behalf and in behalf of First Iowa Hydro Electric Cooperative, and said individual plaintiffs constitute all of the members of the First Iowa Hydro Electric Cooperative and each own an equal one-fifth interest therein.

3. That on September 8th, 1948, the Federal Power Commission of the United States issued a license to First Iowa Hydro Electric Cooperative for the construction, operation and maintenance of Project License No. 1853, the effective date of the license as stated therein being September 1, 1948. That under and by virtue of the Articles of Incorporation and Federal Power Commission license plaintiff First Iowa Hydro Electric Cooperative was permitted and authorized to construct the project known as No. 1853 and to generate, transmit, sell and distribute electrict light and power resulting from the operation of said [fol. 23] project as constructed, within the area served by the corporate defendants named herein.

4. That except for defendant Iowa Utilities Association, each and all of the defendants herein named are private corporations and their names, states of incorporation, and principal places of business are:

Iowa-Illinois Gas and Electric Co., Illinois, Principal Place of Business, Davenport, Iowa,

Iowa Power and Light Co., Iowa, Principal Place of Business, Des Moines, Iowa.

Iowa Southern Utilities Co., Delaware, Principal Place of Business, Centerville, Iowa,

Interstate Power Co., Delaware, Principal Place of Business, Dubuque, Iowa,

Union Electric Power Co., Illinois, Principal Place of Business, St. Louis, Missouri,

Kansas City Power and Light Co., Missouri, Principal Place of Business, Kansas City, Missouri,

Iowa Electric Light and Power Co., Iowa, Principal Place of Business, Cedar Rapids, Iowa,

Northwest Light and Power Co., Delaware, Principal Place of Business, Cedar Rapids, Iowa,

Wisconsin Power and Light Co., Wisconsin, Principal Place of Business, Madison, Wisconsin,

Iowa Public Service Co., Iowa, Principal Place of Business, Sioux City, Iowa,

and that the defendant Iowa Utilities Association is an unincorporated, voluntary association organized, maintained, operated and controlled by and for the corporate defendants and is not organized under the laws of any state of the Union.

[fol. 24] 5. That all of said defendant corporations are engaged in the business of selling, transmitting, and distributing electric power and light in Iowa and are members of the Iowa Utilities Association, with its office in Des Moines, Iowa, within the Southern District of Iowa. That members of said Iowa Utilities Association engage in the sale and distribution of electric light and power in the states of Iowa, Wisconsin, Illinois and Missouri, including the Southern District of Iowa.

6. That the defendants herein are sued jointly and severally.

7. That since on or about June 10, 1938, the corporate defendants herein have controlled and now control approximately 90 percent of the business of the sale and distribution of electric light and power in the state of Iowa, Southwestern Wisconsin, Western Illinois, and Northeastern Missouri, and that said defendants have a virtual monopoly of said electric light and power business in the area last above described.

8. That the object and purpose of the plaintiffs in the organization of the First Iowa Hydro Electric Cooperative was the construction of dams, diversion channels, hydroelectric generating facilities, and transmission lines for the generation and distribution of electric power and light throughout the state of Iowa, Southwestern Wisconsin, Western Illinois, and Northeastern Missouri.

9. That the members of plaintiff association, as provided by the laws of the State of Iowa, conduct the business of the association through a Board of Directors, and said Board of Directors as provided by its Articles of In-[fol. 25] corporation conduct the business for the individuals forming said association.

10. That since the organization of the plaintiff First Iowa Hydro Electric Cooperative in 1938 the defendants conspired to monopolize, monopolized, and attempted to monopolize the generation, transmission, distribution, and sale of electric light and power, in the area above described, and have unlawfully contracted, combined, and conspired to restrain trade and commerce among the several states in the distribution of electric light and power. These unlawful conspiracies to monopolize, monopolies, attempts to monopolize, and contracts, combinations, and conspiracies to restrain interstate trade and commerce in electric light and power have been and are being consummated by the following means and methods, among others:

(a) Deliberate and continued attempts to prevent the issuance of a license to the plaintiff First Iowa Hydro Electric Cooperative for the construction, operation and maintenance of the project originally known as the Cedar River Dam and later as Federal Power Commission Project License No. 1853.

(b) The agreement during the year 1948 reciting in substance their unalterable opposition to the proposed hydro electric project on the Cedar River in Muscatine County, Iowa; their agreement to pool their resources to oppose the construction of said proposed project; and their further agreement that in the event said project should be built said defendants would not use any power from said generation facilities.

(c) By threatening banks, bankers, financial institutions, their officers, brokers and/or agents with boycott and loss of utility business on a national scale as well as the loss of future business from the members of the Iowa Utilities Association.

(d) Carrying said agreement and conspiracy into effect by applying various persuasions, influences, threats, and intimidations to banks and banking and financial institutions solicited, requested, approached, and contacted in behalf of plaintiffs to assist in financing said project and

thereby forcing and coercing said financial institutions to refuse to assist in the marketing of any securities to finance the cost of constructing said proposed project.

(e) And otherwise hampering, interfering with, obstructing and impeding the financing of said project by divers and sundry means, methods and practices, the precise nature of which are unknown to these plaintiffs, but which proved nevertheless effective in thwarting and preventing the plaintiffs from obtaining the necessary funds to construct said project.

(f) By various other unfair competitive practices designed to appropriate all of the electric light and power distribution in the areas in Iowa, Wisconsin, Illinois, and Missouri hereinbefore referred to, all of which were designed to prevent plaintiff and other possible competitors from engaging in the generation and distribution of electric light and power in the area last above referred to.

11. That the period of time covered by this complaint began on or about the middle of the year 1938 and con- [fol. 27] tinued through the years following, up to and including the date upon which this complaint is filed.

12. That plaintiffs have at all times since receiving their certificate to do business as an association made diligent effort to finance and construct said project, and they, together with various other individuals interested in the construction of said project and in the resulting generation, transmission, distribution and sale of electric light and power on reasonable terms in the territory adjacent thereto in the State of Iowa and adjoining states, began negotiations with various banks and financial institutions in New York City, Chicago, and elsewhere to arrange for the sale of bonds and other securities to pay for the cost of constructing said project. These plaintiffs further state that numerous engineers of national reputation, well and truly qualified, were employed to make and did make a full and complete investigation of said project and pronounced the same to be feasible, doable and economically sound.

13. That in carrying the aforesaid conspiracy and scheme into effect the defendants and each of them, acting through their officers and various agents, have by various threats intimidated, persuaded, influenced and forced the various banks, banking and financial institutions approached and/or contacted by the plaintiffs and their various officers and agents to refuse to assist in the marketing of any securities to finance the cost of constructing said proposed project.

14. That plaintiffs have made diligent effort continuously and at all times to finance said project, that the [fol. 28] same has been pronounced economically sound and feasible by numerous banking and financial institutions and approved by such institutions, but defendants' unfair competitive practices, unlawful activities within the market, and campaign of false and misleading propaganda, all executed as part of their conspiracy to prevent plaintiffs from constructing said proposed project, have served, as was intended by defendants, to prevent plaintiffs from obtaining the necessary financing at times when capital markets were favorable. Thus plaintiffs have been deprived of the opportunity to construct said project and to serve the public in the manner contemplated by plaintiffs and in the manner which the public and the business require.

15. That but for the threats, intimidation, coercion and other activities of defendants hereinbefore described the financial institutions above referred to would have willingly furnished the funds to pay the cost of said proposed project.

16. That each and all of the acts of defendants hereinbefore described were intended, conceived, and carried out for the purpose of, and in restraint of trade and commerce among the several states, and were in effect and in fact a combination and conspiracy in restraint of trade and commerce among the several states of the United States.

17. That the unlawful acts and things done, as recited in the paragraphs above, have caused and are causing great

and lasting and irreparable damage to the good will, the business, the property, the competitive position, and the future prospects of plaintiffs.

18. That by reason of the combination and conspiracy and the various acts done by defendants, their officers and their various agents and each of them, in pursuance thereof as hereinbefore stated, the plaintiffs have been damaged in the amount of $40,000,000.

[fol. 29] Wherefore, plaintiffs pray:

1. That summons issue directed to each and all of the defendants, as named in paragraph 4 above, commanding them to appear and to answer the allegations contained in this complaint and to abide by and perform such orders and decrees as this Honorable Court may in the premises make.

2. That during the course of this litigation, and at the conclusion of the trial for all time thereafter the defendants jointly, and each of them severally, be enjoined from doing any act or thing identical with, or in kind and character like unto the acts and things herein complained of, and that in particular the defendants be enjoined from all collective action relating to, and from any and all moves which directly or indirectly threaten to monopolize or to establish their dominion over electric light and power, and that such injunction be imposed upon the defendants and each of them and upon all their officers, directors, servants and employees, and upon all persons natural and corporate acting for or in concert with said defendants or any of them, or under their control, direction, permission or license.

3. That upon the conclusion of the trial the plaintiffs have and recover of and from the defendants, jointly and severally, the damages by plaintiffs sustained in the sum of $40,000,000 and that as commanded by the law said damage be trebled, amounting as so trebled to the total sum of $120,000,000.

4. That this Court allow to the plaintiffs and that the defendants, jointly and severally, be required to pay the full costs of the suit, and in addition thereto a reasonable fee for the services of plaintiffs' attorneys.

[fol. 30] 5. That the Iowa Utilities Associations be enjoined from operating as a combination, confederation and conspiracy in restraint of trade and commerce among the several states and from all activities designed to prevent new competitors from entering the field of electric power and light generation, transmission, and distribution.

6. And that the plaintiffs have such other, further, additional and different relief as the course of this action shows to be necessary and this Honorable Court may deem to be just and proper.

FRANCE, FRANCE & NADY,

JAMES D. FRANCE,

XAVIER C. NADY,
First National Bank Building,
Tipton, Iowa,

JAMES R. McMANUS,

ALLAN R. SHEPHERD,
417 Fleming Building,
Des Moines, Iowa,
Attorneys for Plaintiffs.

Haley, Doty & Schellenberg,
1101 Connecticut Avenue,
Washington, D. C.,
Of Counsel.

[fol. 31] Demand for Jury.

Plaintiffs pursuant to Rule 38 (b) of the Rules of Civil Procedure of the District Courts of the United States demand a trial by jury of all issues tendered by the above and foregoing complaint, except the issue whether or not plaintiffs are entitled to the equitable injunctive relief prayed.

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Attorneys for Plaintiffs.

[fol. 32] (Order of District Court appointing Special Master.)

(Filed in U. S. District Court on May 23, 1955.)

United States District Court
Southern District Of Iowa
Davenport Division

First Iowa Hydro Electric Cooperative, et al.,
Plaintiffs.
No. 1-224. vs. Civil Action.
Iowa-Illinois Gas and Electric Company, et al.,
Defendants.

It appearing from the record herein and from the statements of counsel that it is anticipated that the depositions the taking of which will be commenced at Davenport, Iowa, on June 6, 1955, as ordered, will involve the examination of the several parties plaintiff and the production of numerous documents, that the nine defendants other than movant, Union Electric Power Company, are privileged to examine those parties whose depositions are to be taken, and that it will expedite the taking of depositions and otherwise will be in the interest of justice to appoint a Special Master in connection therewith;

I. It Is Ordered that Wayne G. Cook of Davenport, Iowa, be and is appointed as Special Master in this action in connection with the taking of the discovery depositions of parties plaintiff and the depositions of other parties, with the following powers:

1. To supervise the conduct of the taking of said depositions, including the length thereof;

2. To rule on any objections to questions, which objections, pursuant to Rule 32(c) of the Rules of Civil Procedure, must be made, if at all, during the taking of the depositions;

3. To rule upon all applications for relief available to and which may be made by any party, during or in connec-

tion with the said depositions under Rules 26 through Rule 37(a), and Rule 45(a) through (d) of the Federal Rules of Civil Procedure;

4. Such other powers as the court may by order later prescribe.

[fol. 33] II. It Is Further Ordered that any action taken or ruling made shall be subject to review by the undersigned judge of this court, or any judge sitting by assignment herein, upon the application of any party.

III. It Is Further Ordered that by reason of the appointment presently of a Commissioner to take such depositions, the presence of said Special Master shall not be continuously required at the taking thereof, but that he shall attend as may be necessary to rule upon such matters as may arise under Paragraphs I—1, 2 and 3 hereof, as from time to time, in his judgment, may appear necessary to promote and expedite the taking of the depositions. This shall not prevent, with the consent of the parties interested therein, the certification to the Special Master of any question requiring his ruling.

IV. It Is Further Ordered that the compensation to be allowed to the Special Master shall be paid by the defendant Union Electric Power Company and the other defendants participating in the taking of said depositions.

V. It Is Further Ordered that any objections by any party to the appointment of said Special Master shall be made in writing and filed with the Clerk of this Court at Des Moines, Iowa, on or before June 2, 1955.

Signed at Des Moines, Iowa, this 23rd day of May, 1955.

WM. F. RILEY,
United States District Judge.

Notice to Attys. 5/23/55

Ent. 2-OJ-558

[fol. 34] (Memorandum Order of District Court denying Motion of Plaintiffs to assess Attorney Fees.)

(Filed in U. S. District Court on June 4, 1955.)

In this matter there has been submitted a motion of plaintiffs to assess upon defendant Union Electric Power Company the expense of plaintiff's attorneys incident to their attendance at the taking of the deposition of plaintiff Harry J. Strong, under Rule 26, and scheduled to commence at Davenport, Iowa, on June 6, 1955, pursuant to the order entered herein on May 16, 1955.

Written statements of counsel for the parties in support of and in opposition to the motion have been filed pursuant to order of court, and the court has given due consideration thereto. It is to be remembered that this action was instituted by the plaintiffs and the venue was laid in the Davenport Division. When the action was commenced defendants, in accordance with the Federal Rules of Civil Procedure, were accorded the right of discovery depositions. They have elected to have such depositions of the plaintiffs taken at Davenport, Iowa, which is the residence of Mr. Harry J. Strong, whose deposition will be first taken. The expense of procuring available space for the taking, of providing reporters to take and transcribe the depositions, and the expense of a Special Master named by the court to serve in connection with the taking of these depositions, is all to be borne by the defendant Union Electric Power Company and such other defendants as may participate. Despite the authority conferred by Rule 30(b) of the Federal Rules of Civil Procedure, to permit the court to make any order "which justice requires," the court believes that it is not within the contemplation of the Rule that an allowance [fol. 35] of expenses sought by plaintiffs in their motion should be assessed to defendant, and that the defendant should have a right to proceed without being burdened with this additional expense. The nature of the depositions to be taken and the effective and expeditious prosecution of this inquiry, in the opinion of the court, require the depositions to be taken orally and not by written interrogatories. The court has accordingly so ordered the taking.

The Clerk will enter the following:

Order

Upon consideration of plaintiffs' motion to require defendant Union Electric Power Company to pay the expenses and fees of the plaintiffs' attorneys in respect to the depositions of the plaintiffs as presently scheduled to be taken at Davenport, Iowa, and after due consideration of the written statements filed by the parties in support of and in opposition thereto, the court finds that the motion should be denied; and

It is Therefore Ordered that plaintiffs' motion to allow expense of taking depositions shall be and is hereby denied. An exception is granted.

Signed at Des Moines, Iowa, this 4th day of June, 1955.

WM. F. RILEY,
United States District Judge.

[fol. 36] (Order of District Court relating to Discovery Deposition of Harry J. Strong)

(Filed in U. S. District Court on July 30, 1955)

In this action the discovery deposition of Harry J. Strong is in progress at Davenport, Iowa, having continued with adjournments since June 6, 1955.

The court has had occasion to examine considerable portions of the transcript of the deposition because of plaintiffs' motion to vacate order of appointment of the Special Master and to quash certain portions of the discovery deposition, heard at Des Moines, Iowa, on July 21, 1955. The court has also had a conference with counsel for the plaintiffs and the defendant Union Electric Power Company, conducting the examination of witness Harry J. Strong.

The court is advised that copies of the transcript of the discovery deposition are made and furnished daily by the Commissioner to counsel for the plaintiffs and for each de-

fendant and to the Special Master. The court is conscious of the practical problem which this fact creates in making effective the order herein to be made but because of its confident belief in the willingness and ability of counsel to do so by their good faith cooperation, is unready to impose restrictions upon the continued delivery to counsel by the Commissioner of copies of the daily transcript.

After due consideration, for good cause appearing to the court and on the court's own motion, the Clerk is directed to enter the following

Order

The court sua sponte, for good cause, finds; and

[fol. 37] It Is Ordered—

1. The original transcript of the discovery deposition of Harry J. Strong, commenced in this action on June 6, 1955, and being continued at Davenport, Iowa, shall be filed with the Commissioner (who for that purpose may utilize the facilities of the office of the Clerk of this Court) and held by the Commissioner until signed and certified as provided by the Federal Rules of Civil Procedure, when it shall be sealed and filed with the Clerk and opened only by order of the court.

2. The distribution of copies of the transcript may be made to counsel of record and to the Special Master only, but no copy of such copies, or any parts thereof, shall be made or used by any counsel or party.

3. The Commissioner at all times shall permit examination of the transcript by counsel of record and the Special Master only, and all counsel and parties are directed to effectuate the purposes and preserve the integrity of this order by their use of their daily copy of the transcript in manner appropriate to that end.

Signed at Des Moines, Iowa, this 30th day of July, 1955.

WM. F. RILEY,
United States District Judge.

[fol. 38] (Notice of entry of Appearance of Robert M. Bell and Bell, Farrar & Scott as Attorneys for Plaintiffs.)

(Filed in U. S. District Court on August 29, 1955.)

Now comes Bell, Farrar & Scott, and enter their appearance in the above entitled cause as associate attorneys for First Iowa Hydro Electric Cooperative, F. A. E. Gillmor, Carl J. Mitzner, Harry J. Strong, Harry Imel, and P. H. Naber.

We further request that all other copies of Notice of Hearing be sent to said attorneys at the address as shown below.

ROBERT M. BELL,
BELL, FARRAR & SCOTT,
Attorneys for Plaintiff.

BELL, FARRAR & SCOTT
Attorneys at Law
303 Safety Building
Rock Island, Illinois

[fol. 39] Motion to Quash Appearance.

(Filed in U. S. District Court on August 31, 1955.)

Come now the undersigned, appearing as officers of this court and as the attorneys of record for plaintiffs in this cause since it was docketed on February 18, 1954, and move to quash the purported appearance which was filed in this cause in the office of the clerk of this court on or about the 29th day of August, 1955, by Bell, Farrar and Scott, Attorneys at Law, Rock Island, Illinois, wherein they purport to enter an appearance for and in behalf of the plaintiffs in the above entitled cause, for each of the following grounds.

1. The firm of Bell, Farrar and Scott is not personally known to any of the attorneys of record for plaintiffs in this cause and none of the undersigned have ever seen or talked with any member of said firm.

2. The undersigned have not requested plaintiffs to provide or furnish other counsel or legal assistance in this cause to date.

3. The plaintiffs have not discussed with the undersigned the [advisibility] or necessity of employing other counsel in this cause and the appearance filed by Bell, Farrar and Scott was without the knowledge, consent or prior invitation of the undersigned.

4. That after a great deal of research and investigation by the undersigned, the complaint in this suit was filed and docketed February 18, 1954. Since then, the undersigned have spent the major portion of their time in giving attention to the prosecution of this cause, including research, briefing, preparation of pleadings, court appearances and prolonged discovery deposition proceedings, involving a great deal of work, research, experience, skill and ability.

5. That the principal asset of the First Iowa Hydro Electric Cooperative consists of a permit or license to build [fol. 40] what is commonly known and referred to as the "Moscow Dam", which permit or license was issued to it in September, 1948, by the Federal Power Commission, Washington, D. C.

6. That the cooperative is indebted at this time in the approximate amount of $1,300,000. There is not and will not be any possible source of funds available for the purpose of compensating the undersigned for their services in this litigation unless there is a successful outcome of the suit. Compensation for the efforts of the undersigned, therefore, depends entirely on the results accomplished in this lawsuit, as there are not sufficient assets or funds available for that purpose.

7. That the firm of Bell, Farrar and Scott do not appear in this litigation at the request of the undersigned or in association with the undersigned, and the undersigned are all of the lawyers who appeared of record for the plaintiffs prior to the filing of the purported entry of appearance by Bell, Farrar and Scott heretofore mentioned. The firm of Bell, Farrar and Scott and the individual members thereof are all residents of Rock Island, Illinois and are non-residents of Iowa.

8. That the undersigned protest and object to the unwarranted attempted intrusion of said attorneys into this lawsuit which was brought February 18, 1954, for each and all of the reasons heretofore given. The undersigned have had no choice in the selection of such firm as associate counsel and have had no consultation with them and did not know they were going to file their appearance in this cause until they did so and have had no correspondence with them or any communication of any kind from them prior to the time such purported appearance was filed.

9. That attached hereto and marked Exhibit "A" is a letter received by X. C. Nady, one of the undersigned, on August 26, 1955 through the United States mail, which was the first knowledge or information that the undersigned had of the intention of said firm to attempt to enter said appearance in this cause. No other communication has been received by any of the undersigned from Bell, Farrar and Scott.

10. That no application has been filed in this cause by anyone to this date, so far as is known to the undersigned, seeking permission for the attorneys mentioned to appear in this lawsuit and no order has been made granting such right to said attorneys.

[fol. 41] 11. The undersigned respectfully requests that the foregoing motion be set down for hearing, as soon as the convenience of the court will permit, and that upon the presentation thereof to the court an order issues for a rule to show cause by the law firm of Bell, Farrar and Scott of Rock Island, Illinois, as to why said motion should not be sustained.

JAMES D. FRANCE,

X. C. NADY,
1st National Bank Building,
Tipton, Iowa.

J. R. McMANUS,

A. R. SHEPHERD,
417 Fleming Building,
Des Moines, Iowa.

State of Iowa,
Polk County—ss.

We, the undersigned, being first duly sworn on oath depose and say that we are two of the attorneys of record in the above entitled cause whose names are signed to the foregoing motion, that we have collaborated in the preparation of the motion, that we know that facts set forth therein and the allegations therein contained are true as we, and each of us, verily believes.

X. C. NADY,

J. R. McMANUS.

Subscribed and sworn to before me by the said X. C. Nady and J. R. McManus on this 31 day of August, 1955.

(Notarial Seal)

GERALDIN DeMARCO,
Notary Public in and for
Polk County, Iowa.

[fol. 42] Exhibit "A."

Law Office of
Bell, Farrar & Scott
Suite 303 Safety Building
Rock Island, Illinois

Benjamin S. Bell (1934-1950)
Benj. D. Farrar
Earl L. Scott
Robert M. Bell
Robert G. Scott
John A. Bell

Office at
Erie, Illinois

August 25, 1955

Mr. X. C. Nady
Attorney at Law
Tipton, Iowa

Dear Mr. Nady:

In re: First Iowa Hydro Electric Cooperative, Et Al, Plaintiffs, —vs— Iowa-Illinois Gas and Electric Co., Et Al., Defendants.

We have been engaged by the plaintiffs in the above case to assist in representing them in the case now pending in

the Federal Court in Davenport, Iowa. We are today filing our Entry of Appearance and notifying all defendants' attorneys of our position.

After talking with Mr. Strong and Mr. Gilmore, we have not been able to determine your position. We would like very much to meet with you at your convenience, prior to the 6th of September, so that we can become acquainted and plan the work in the coming depositions.

Very truly yours,

BELL, FARRAR & SCOTT,
By Robert M. Bell

RMB:nlm

[fol. 43] Petition To Intervene On Rule To Show Cause On The Motion Of Attorneys France, France & Nady and J. R. McManus and Allan H. Shepherd To Quash The Entry Of Appearance Of The Law Firm Of Bell, Farrar & Scott.

(Filed in U. S. District Court on September 2, 1955.)

The United States District Court
Southern District Of Iowa
Davenport Division

First Iowa Hydro Electric Cooperative, et al,
Plaintiffs,
No. 1-224 vs. Civil
Iowa-Illinois Gas and Electric Company, et al,
Defendants.

Now comes Harry J. Strong, Harry Imel and Frank A. E. Gillmor, P. H. Naber, individually as plaintiffs in this action and as representatives of all other individual plaintiffs and also as members constituting a quorum of the Board of Directors of First Iowa Hydro Electric Cooperative and state unto the Court as follows:

1. Frank A. E. Gillmor is President of the First Iowa Hydro Electric Cooperative and also a member of the Board of Directors of said Cooperative.

2. Harry J. Strong is Secretary-Treasurer of said Cooperative and also a member of the Board of Directors of said Cooperative.

[fol. 44] 3. Harry Imel is a member of the Board of Directors of said Cooperative, and P. H. Naber is a member of the Board of Directors of said Cooperative.

4. That said Cooperative originally hired the firm of France, France and Nady of Tipton, Iowa as counsel for the Cooperative in the prosecution of the subject case; that said cooperative hired the law firm of James R. McManus and Allan R. Shepherd to assist the law firm of France, France & Nady in the prosecution of said case; that the only contract that exists between First Iowa Hydro Electric Cooperative and the law firms of France, France, & Nady and Allan R. Shepherd & James R. McManus, are copies of resolutions passed by the Board of Directors of the First Iowa Hydro Electric Cooperative.

5. That no members of the First Iowa Hydro Electric Cooperative ever entered into any contract other than the contract between the Cooperative, or the Cooperative's action and said attorneys.

6. That the terms of the contract of said employment of said attorneys as outlined in the minutes of the meeting of the Board of Directors of First Iowa Hydro Electric Cooperative, which minutes were furnished to said attorneys, is the following terms of employment: "That the fee for such work as done by said attorneys shall be as that allowed by the Court as provided by law, or should the law suit be settled out of Court, the fees shall be on a quantum merit basis as recommended by our general counsel, Mr. Jake More."; that it was further understood by First Iowa Hydro Electric Cooperative that First Iowa Hydro Electric Cooperative would be liable for Court costs and "out of pocket" expense.

[fol. 45] 7. That since the initiation of said action, First Iowa Hydro Electric Cooperative has forwarded to said attorneys, suins in excess of Five Thousand Dollars

($5,000.) and has covered hotel travel and meal expenses of said attorneys over and above the said sum forwarded.

8. That since the 30th day of July, A.D., 1955, the law firms of France, France & Nady and J. R. McManus and Allan R. Shepherd have refused to perform any actions in furtherance of this cause of action unless a payment of Five Thousand Dollars ($5,000.) was made to the law firm of France, France & Nady and a like payment of Five Thousand Dollars ($5,000.) to the law firm of James R. McManus and Allan R. Shepherd.

9. That said demand for the sum of Ten Thousand Dollars ($10,000.) as above stated was contrary to the terms of employment of said attorneys.

10. That because of the refusal of the attorneys to perform acts necessary in the furtherance of said law suit, it became necessary for your petitioners in this petition to discuss help with other attorneys; that discussions were had with the law firm of Bell, Farrar & Scott of Rock Island, Illinois, and your petitioners were informed by Bell, Farrar & Scott of Rock Island, Illinois that they would enter the case if it were agreeable with the attorneys of record.

11. That an Entry of Appearance of the law firm of Bell, Farrar & Scott was discussed with the attorneys of record and a meeting was set up whereby the law firm of Bell, Farrar & Scott was to confer with X. C. Nady in the law offices of France, France & Nady in Tipton, Iowa on the 16th day of August, A.D., 1955 at 10:00 o'clock A.M.; that for reasons unknown to your petitioners or to the law [fol. 46] firm of Bell, Farrar & Scott, on the 15th day of August, A.D., 1955, X. C. Nady cancelled said meeting.

12. That First Iowa Hydro Electric Cooperative has been informed by the law firms of France, France & Nady, by and through, X. C. Nady, and the law firm of James R. McManus and Allan R. Shepherd, by and through James R. McManus that said law firms would work with and cooperate with the additional counsel of Bell, Farrar & Scott.

13. That upon this assurance, on the 24th day of August, A.D., 1955, the law firm of Bell, Farrar & Scott mailed

an entry of appearance to the parties defendant with a copy of said appearance to the chief counsel for First Iowa Hydro Electric Cooperative, Mr. X. C. Nady.

14. That Mr. James R. McManus, after the 24th day of August, 1955, made a trip to Chicago, Illinois where he talked to bankers and engineers and attempted to get them to withdraw their support of First Iowa Hydro Electric Cooperative.

15. That repeatedly since the filing of this suit, the law firms of France, France & Nady and James R. McManus and Allan R. Shepherd have stated that the strategy of the opposition was to break First Iowa Hydro Electric Cooperative of funds to continue said law suit; that the demands for Ten Thousand Dollars ($10,000.) by said attorneys, is, in the minds of the directors of First Iowa Hydro Electric Cooperative, a furtherance of the strategy of the defendants of this action.

16. That as of this date First Iowa Hydro Electric Cooperative and each individual plaintiff, has completely lost faith in the ethics and honesty and the attorney-client relationship as exists between First Iowa Hydro Electric Cooperative and the law firms of France, France & Nady and James R. McManus and Allan R. Shepherd.

[fol. 47] 17. That the law firms of France, France & Nady and James R. McManus and Allan R. Shepherd have stated to the full Board of Directors of First Iowa Hydro Electric Cooperative that a greater interest is owned in this law suit by the attorneys of record, namely France, France & Nady and James R. McManus and Allan R. Shepherd, than is owned by any of the clients of this action.

18. That attorney, James R. McManus, in the Mississippi Hotel in Davenport, Iowa, on the 13 day of July, A.D., 1955 punched the General Manager and Secretary-Treasurer of First Iowa Hydro Electric Cooperative in the face causing him to lose over a quart of blood and kicking him when he was down.

19. That upon numerous occasions the law firms of France, France & Nady and James R. McManus and Allan

R. Shepherd have stated that their rate of compensation was to be merely quantum merit based upon successful prosecution of said case; that at no time has any contract or any offer been made by any action of First Iowa Hydro Electric Cooperative giving to said attorneys any percentage of said law suit.

20. That the law firm of France, France & Nady and the law firm of James R. McManus and Allan R. Shepherd have now stated to the Board of Directors of First Iowa Hydro Electric Cooperative and to the individual plaintiffs that they will not work with any other attorneys; that they own an interest in this law suit; that no one can fire them from this law suit and that it is impossible for the client to retain any other counsel to protect their interests.

21. That the law firm of Bell, Farrar & Scott has stated to the plaintiff in this action, First Iowa Hydro Electric Cooperative, and the individual plaintiffs, that they could [fol. 48] only enter this cause or law suit and help the individual plaintiffs and First Iowa Hydro Electric Cooperative upon cooperation of the previous [consel]; second, the withdrawal of the previous counsel, or third—if First Iowa Hydro Electric Cooperative would be without counsel and be in a position to hire the law firm of Bell, Farrar & Scott; that the law firm of Bell, Farrar & Scott has informed First Iowa Hydro Electric Cooperative and the individual plaintiffs that it would be necessary for them to withdraw their notice of appearance unless and until one of the three contingencies above stated were met.

22. That the action of the law firms of France, France & Nady and James R. McManus and Allan R. Shepherd in their Rule to Show Cause on the Motion to Quash the Entry of Appearance of the law firm of Bell, Farrar & Scott is an unethical action whereby said attorneys are attempting to compel the plaintiffs in this action to proceed to further hearings with counsel in which they have completely lost faith and counsel they feel are not working in the best interests of the clients; that it has been reported to the petitioners that counsel for the defendants in this action have stated that the law firms of France, France & Nady and James R. McManus and Allan R. Shepherd are "under

the thumbs'' of counsel for the defendants, and these reported tales have increased the loss of faith of the plaintiffs in this action, in the attorney relationship of the firms of France, France & Nady and James R. McManus and Allan R. Shepherd.

23. That on Order of this Court, discovery depositions are to resume on Tuesday Morning, September 6, 1955 at Davenport, Iowa; and that at that time it will be impossible for the defendant, Harry J. Strong, to testify or for First Iowa Hydro Electric Cooperative to allow him to testify if the attorneys France, France & Nady, James R. McManus and Allan R. Shepherd are present for the plaintiffs in this action have completely lost faith in such attorneys.

[fol. 49] 24. That because of this Motion to Quash, the plaintiffs in this action are now without attorneys because the law firm of Bell, Farrar & Scott is not in a position to protect the interests of the clients for they have not been afforded the consultations which are necessary when new attorneys enter a cause of action of this nature.

25. That the rights of plaintiffs in this action will be materially impaired unless this Court postpones the starting of the said depositions until such time as a full hearing can be had on the complete allegations of this Complaint and until such time as your petitioners can retain legal counsel to represent them in said hearing.

26. That the first notice of said hearing now before the Court was received by your petitioners on the afternoon of September 1, 1955 and that it has been impossible for your petitioners to do anything but rush this petition to the Court that their plight might be known to the Court. That because of the seriousness of your petitioners' petition, your petitioners respectfully request that the Iowa Bar Association be notified of these proceedings and be made a party to these proceedings.

27. That your petitioners respectfully request of the Court that a hearing on this matter be set on a day certain that all parties may be adequately prepared to more fully present their evidence and petitions.

28. It is further stated that your petitioners, as members of the Board of Directors of the First Iowa Hydro Electric Cooperative, attended a meeting whereby the law firms of France, France & Nady and James R. McManus and Allan R. Shepherd were discharged as attorneys of record for First Iowa Hydro Electric Cooperative in Civil [fol. 50] suit No. 1-224 that the resolution of the First Iowa Hydro Electric Cooperative was as follows: "That the law firm of James R. McManus and Allan R. Shepherd, 417 Fleming Building, Des Moines, Iowa and the law firm of France, France & Nady, Tipton, Iowa are hereby and henceforth discharged as attorneys of record for First Iowa Hydro Electric Cooperative in Civil suit 1-224 in Southern District of Iowa, Davenport, Division of United States District Court."; that because of said resolution of the Board of Directors of First Iowa Hydro Electric Cooperative, the law firms of France, France & Nady and James R. McManus and Allan R. Shepherd are today in the status of attorneys with no clients and therefore have no status in this Court at this time; that there is no action filed in the name of France, France & Nady and James R. McManus and Allan R. Shepherd and they have no interest which will now allow them to substitute as plaintiffs which might allow them to bring any action in Civil action No. 1-224 before this Court; that the only remedy open to the law firms of France, France & Nady and James R. McManus and Allan R. Shepherd, because of the resolution aforesaid of the Board of Directors of First Iowa Hydro Electric Cooperative is a civil action for work and labor performed, and their attempt to use the Courts in the manner in which they are at present, is an abuse of the form and abuse of the remedy.

29. That unless the Court grants this petition to intervene and set forth all the facts in this petition and allows adequate time to prepare the evidence, your petitioners will be denied their rights to prosecute a cause of action in the Courts of the United States in accordance with the Constitution of the United States.

30. That at no time has any notice ever been forwarded to any of the plaintiffs of this action of the present acts

of the law firms of France, France & Nady and James R. [fol. 51] McManus and Allan R. Shepherd before this Court; and in fact, the only communication received by plaintiffs of the original action was a telephone call after five o'clock P. M. on the 1st day of September, A.D., 1955 by the law firm of Bell, Farrar & Scott wherein the law firm of Bell, Farrar & Scott stated they were being cited unto the Court,

Wherefore, your petitioners pray:

1.—That they be permitted to intervene in the matter before the Court at this time.

2.—That a full hearing be had on the matter before the Court at this time upon adequate notice to all parties concerned.

3.—That each and every plaintiff in this action be notified of said hearing.

4.—That the Iowa Bar Association be notified of said hearing.

5.—That a postponement be had in the discovery depositions of Harry J. Strong until the Court has finally disposed of all matters in said hearing.

6.—That the attorneys France, France & Nady and James R. McManus and Allan R. Shepherd [by.] cited before this Court for their action in betraying the attorney client relationship in this matter.

7.—That France, France & Nady and James R. McManus and Allan R. Shepherd be stricken from the records as attorneys of record in Civil action No. 1-224 before this Court.

8.—That time and leave be granted to petitioners to prepare a more complete petition which will more fully set out the many acts committed against the best interest of the clients, committed by the law firms of France, France & Nady and James R. McManus and Allan R. Shepherd.

[fol. 52] 9.—That attorneys France, France & Nady and James R. McManus and Allan R. Shepherd's Motion to

Quash the Entry of Appearance of the law firm of Bell, Farrar & Scott be denied.

And for such other and further relief as to the Court May seem Meet.

HARRY J. STRONG,
HARRY IMEL,
FRANK A. E. GILLMOR,
P. H. NABER.

State of Iowa,
County of Polk—ss.:

Harry J. Strong, Harry Imel, Frank A. E. Gillmor and P. H. Naber, being first duly sworn on oath, state that they have read the foregoing petition by them subscribed and that the matters and things contained therein stated are true to the best of their knowledge and belief.

HARRY J. STRONG,
HARRY IMEL,
FRANK A. E. GILLMOR,
P. H. NABER.

Subscribed and sworn to before me this 2nd day of September, A.D., 1955.

(Notary Seal)

MARY F. HOLSTAD,
Notary Public in and for Polk County, Iowa.
My Commission Expires July 4, 1957.

[fol. 53] (Motion of Bell, Farrar & Scott to withdraw their Appearance as Attorneys for Plaintiffs)

(Filed in U. S. District Court on September 2, 1955)

Now comes Bell, Farrar & Scott, attorneys, and move this Court to withdraw their appearance as attorneys for the plaintiffs in the above-entitled cause and ask that an order be so entered.

By John A. Bell.

BELL, FARRAR & SCOTT
Attorneys at Law
304 Safety Building
Rock Island, Illinois.

[fol. 54] (Order of District Court on withdrawal of Appearance of Bell, Farrar & Scott)

(Filed in U. S. District Court on September 6, 1955)

The filing herein at the hearing on 2 September 1955, for Bell, Farrar & Scott by John A. Bell, of a withdrawal of appearance as attorneys for plaintiffs having effected such withdrawal, the matters raised by the motion to quash appearance require no consideration by the court.

For the same and other reasons, the instrument entitled "Petition to Intervene,' etc., tendered by plaintiffs is not to be filed nor to be a part of the record herein. The statement to plaintiff Strong at the hearing on 2 September 1955, that its contents would be considered was made prior to the filing by John A. Bell of the withdrawal of appearance of Bell, Farrar & Scott, the filing of which left nothing before the court for hearing and determination, and made the so-called "Petition to Intervene," redundant and immaterial. For other good cause appearing to the court additional to the foregoing, it is not to be accepted for filing, or if for any reason regarded as filed, it is stricken in toto on the court's own initiative.

It Is Therefore Ordered that the withdrawal of appearance of Bell, Farrar & Scott is recognized and accepted, that in consequence the motion to quash appearance requires no consideration, and that the instrument denominated "Petition to Intervene," etc., on behalf of certain plaintiffs tendered to be filed shall not be filed nor shall be a part of the files or record herein.

Signed at Des Moines, Iowa, this 6th day of September, 1955.

WM. F. RILEY,
United States District Judge.

[fol. 55] Motion for Leave to Remove France, France & Nady and James R. McManus and Allan R. Shepherd as Attorneys for Plaintiffs Herein.

(Filed in U. S. District Court on September 16, 1955.)

Now comes First Iowa Hydro Electric Cooperative, a corporation, Harry J. Strong, Harry Imel, Frank A. E.

Gillmor, P. H. Naber and Carl J. Mitzner, Individual plaintiffs in this action, the individual plaintiffs being all the members of the Board of Directors of First Iowa Hydro Electric Cooperative, the corporate plaintiff, and state unto the Court as follows:

1. That First Iowa Hydro Electric Cooperative is a corporation organized under, and existing by virtue of the laws of Iowa, and maintaining its principal office at Muscatine, Iowa.

2. That Frank A. E. Gillmor is President of the First Iowa Hydro Electric Cooperative and also a member of the Board of Directors of said Cooperative.

3. That Carl J. Mitzner is Vice President of the First Iowa Hydro Electric Cooperative and also a member of the Board of Directors of said Cooperative.

4. That Harry J. Strong is Secretary-Treasurer of said Cooperative and also a member of the Board of Directors of said Cooperative.

[fol. 56] 5. That Harry Imel is a member of the Board of Directors of said Cooperative.

6. That P. H. Naber is a member of the Board of Directors of said Cooperative.

7. That France, France & Nady, James R. McManus and Allan R. Shepherd are attorneys for the plaintiffs and because of their conduct it has been impossible for the plaintiffs in this action to hire additional attorneys properly qualified to represent them before this Court, and it is necessary for the plaintiffs to make this appearance in their own behalf unrepresented by counsel to preserve their right to counsel acceptable to the plaintiffs, their present counsel being unacceptable.

8. That the corporate plaintiff employed the firm of France, France & Nady of Tipton, Iowa as counsel for itself and for the individual plaintiffs as counsel in this case; that said cooperative hired the law firm of James R. McManus and Allan R. Shepherd to assist the law firm of France, France & Nady in the prosecution of said case.

9. That said attorneys were employed on the basis outlined in the minutes of the Board of Directors of First Iowa Hydro Electric Cooperative, which minutes were furnished to said attorneys, namely: "That the fee for such work as done by said attorneys shall be as that allowed by the Court as provided by law, or should the law suit be settled out of Court, the fees shall be on a quantum merit basis as recommended by our general counsel, Mr. Jake More."; that it was further understood by the plaintiffs that First Iowa Hydro Electric Cooperative would be liable for Court costs, and "out of pocket" expense of said attorneys.

[fol. 57] 10. That since the initiation of said action, First Iowa Hydro Electric Cooperative has forwarded to said attorneys, sums in excess of Five Thousand Dollars ($5,000.) and has paid hotel, travel and meal expenses of said attorneys over and above the said sum forwarded.

11. That repeatedly aforesaid attorneys have made demands for money over and above expenses such as the demand of J. R. McManus of April 30, 1955 which stated as follows: "Confirming our previous conversation, I beg to advise that it will be out of the question for me to come to Davenport for the depositions unless a minimum sum of Fifteen Hundred Dollars ($1500.00) is paid to me in advance here in Des Moines."

12. That since the 30th day of July, A. D. 1955, the law firms of France, France & Nady and J. R. McManus and Allan R. Shepherd have refused to perform any actions in furtherance of this cause of action unless a payment of Five Thousand Dollars ($5000.) was made to the law firm of France, France & Nady and a like payment of Five Thousand Dollars ($5,000.) to the law firm of James R. McManus and Allan R. Shepherd.

13. That said demand for the sum of Ten Thousand Dollars ($10,000.) as above stated was contrary to the terms of employment of said attorneys.

14. That said attorneys have consistently refused to carry out the orders of the Board of Directors of First Iowa Hydro Electric Cooperative.

15. That said attorneys have refused to associate with attorneys that have the confidence of the plaintiffs, thus precluding plaintiffs from being represented by counsel of their choice.

[fol. 58] 16. That Mr. James R. McManus, after the 24th day of August, 1955, made a trip to Chicago, Illinois where he talked to bankers and engineers and attempted to get them to withdraw their support of First Iowa Hydro Electric Cooperative.

17. That repeatedly since the filing of this suit, the law firms of France, France & Nady and James R. McManus and Allan R. Shepherd have stated that the strategy of the opposition was to break plaintiffs of funds to continue said law suit; that the demands for Ten Thousand Dollars ($10,000.) by said attorneys, is, in the minds of the plaintiffs, a furtherance of the strategy of the defendants of this action, and plaintiffs fear that said result may ensue unless they are permitted to change counsel.

18. That First Iowa Hydro Electric Cooperative and each individual plaintiff, have completely lost faith in their said attorneys to the extent that there is a complete lack of harmony in their relationship, thus imperiling the prosecution of this law suit.

19. That the law firms of France, France & Nady and James R. McManus and Allan R. Shepherd have stated to the full Board of Directors of First Iowa Hydro Electric Cooperative that a greater interest is owned in this law suit by the attorneys of record, namely France, France & Nady and James R. McManus and Allan R. Shepherd, than is owned by any of the clients of this action, thus endeavoring to appropriate this cause of action unto themselves, regardless of the rights and welfare of the plaintiffs.

20. That attorney, James R. McManus, in the Mississippi Hotel in Davenport, Iowa, on the 13th day of July, A. D. 1955, perpetrated a physical assault upon the person of the General Manager and Secretary-Treasurer of First Iowa Hydro Electric Cooperative causing him serious physical injury.

[fol. 59] 21. That upon numerous occasions the law firms of France, France & Nady and James R. McManus and Allan R. Shepherd have stated that their rate of compensation was to be merely quantum merit based upon successful prosecution of said case; that at no time has any contract or any offer been made by any plaintiffs giving to said attorneys any percentage of said law suit, or any right of propriety therein, the cause of action belonging to the plaintiffs.

22. That the law firm of France, France & Nady and the law firm of James R. McManus and Allan R. Shepherd have informed the Board of Directors of First Iowa Hydro Electric Cooperative and the individual plaintiffs that they will not work with any other attorneys; that they own an interest in this law suit; that no one can fire them from this law suit and that it is impossible for the clients to retain any other counsel to protect their interests. Because of their conduct it has become impossible for plaintiffs to engage other counsel.

23. That the action of the law firms of France, France & Nady and James R. McManus and Allan R. Shepherd in their Rule to Show Cause on the Motion to Quash the Entry of Appearance of the law firm of Bell, Farrar & Scott was an unethical action whereby said attorneys were attempting to compel the plaintiffs in this action to proceed to further hearings with counsel in which they have completely lost faith and counsel they feel are not working in the best interests of the clients.

24. It is further stated that the individual plaintiffs, as members of the Board of Directors of the First Iowa Hydro Electric Cooperative, attended a meeting at which the law firms of France, France & Nady and James R. McManus and Allan R. Shepherd were discharged as attorneys of [fol. 60] record for the plaintiffs in this case; and oral notice thereof was given to said attorneys on September 2, 1955; that the resolution of the First Iowa Hydro Electric Cooperative Board of Directors is as follows: "That the law firm of James R. McManus and Allan R. Shepherd, 417 Fleming Building, Des Moines, Iowa and the law firm of France, France & Nady, Tipton, Iowa are hereby and hence-

forth discharged as attorneys of record for First Iowa Hydro Electric Cooperative in Civil suit 1-224 in Southern District of Iowa, Davenport Division of the United States District Court."; that because of said resolution of the Board of Directors of First Iowa Hydro Electric Cooperative, the law firms of France, France & Nady and James R. McManus and Allan R. Shepherd are today in the status of attorneys with no clients and therefore have no standing in this Court at this time; that there is no action filed in the name of France, France & Nady and James R. McManus and Allan R. Shepherd and they have no interest which will now allow them to substitute as plaintiffs which might permit them to bring any action in Civil action No. 1-224 before this Court.

25. That in Civil suit 1-224 the plaintiffs' attorneys' fees become a charge against the defendants, upon successful conclusion of the suit, and the Court by law has a duty to assess such fees as may be reasonable and proper; that the question of the value of the attorneys' fees of the firms of France, France & Nady and James R. McManus and Allan R. Shepherd can only be determined by the Court upon a hearing properly set with defendant's attorneys present, and this question is a question reserved until after completion of the trial.

26. That in equity and good conscience the plaintiff [fol. 61] can only proceed with a fair trial when the law firms of France, France & Nady and James R. McManus and Allan R. Shepherd are no longer attorneys of record, and the question of attorneys' fees for the aforesaid attorneys is reserved until completion of the trial.

27. That because this motion is based on certain facts as well as to the law in relation to attorney and client, and although the facts of this motion are under oath, your movants request that in the event the facts recited herein should be denied by said attorneys, oral testimony should be heard by the Court to determine all questions of fact.

[fol. 62] Wherefore, your petitioners pray:

1.—That France, France & Nady and James R. McManus and Allan R. Shepherd be stricken from the records

as attorneys of record in Civil Action No. 1-224 before this Court.

2.—That the question of attorney fees for attorneys France, France & Nady and James R. McManus and Allan R. Shepherd be reserved until conclusion of this law suit.

3.—That on any question of fact that oral testimony be taken to determine any question of fact.

And for such other and further relief as to Court may seem meet.

HARRY J. STRONG,
HARRY IMEL,
FRANK A. E. GILLMOR,
P. H. NABER,
CARL J. MITZNER,
FIRST IOWA HYDRO ELECTRIC COOPERATIVE,
By Harry J. Strong,
Secretary-Treasurer.

State of Iowa,
County of Muscatine—ss.:

Harry J. Strong, Harry Imel, Frank A. E. Gillmor, P. H. Naber, and Carl J. Mitzner, being first duly sworn on oath, state that they have read the foregoing petition by them subscribed and that the matters and things contained therein are true to the best of their knowledge and belief.

HARRY J. STRONG,
HARRY IMEL,
FRANK A. E. GILLMOR,
P. H. NABER,
CARL J. MITZNER,

Subscribed and sworn to before me this 14th day of September, A.D., 1955.

(Seal)

R. L. LEBER,
Notary Public.

[fol. 63] (Order of District Court accepting Resignation of Wayne G. Cook as Special Master)

(Filed in U. S. District Court on September 21, 1955)

Wayne G. Cook, appointed special master herein on May 23, 1955, for the limited purposes described in the order of appointment, having tendered his resignation effective at the will of the court and matters having recently arisen which make it desirable and in fact necessary, in the opinion of the court, to immediately appoint a master with broader powers,

It is therefore Ordered that the resignation of Wayne G. Cook as special master herein, tendered this day, be and it is hereby accepted, effective immediately.

It is further Ordered that the said Wayne G. Cook be and he is hereby requested to submit a statement of his fees and disbursements as special master for consideration and allowance by the court in accordance with the order of appointment.

Signed at Davenport, Iowa, this 21st day of September, 1955.

WM. F. RILEY,
U. S. District Judge.

[fol. 64] (Order of District Court appointing Edward A. Doerr as Special Master)

(Filed in U. S. District Court on September 21, 1955)

This is an action involving alleged violations of the Sherman Anti-Trust Act, as amended, and of the Clayton Act.

Plaintiffs are a cooperative association organized under the laws of Iowa, and its five individual members and owners, who are also its officers and directors.

There are eleven named defendants, ten of whom are alleged to be private corporations engaged in the business

of producing, selling and distributing electrical power in Iowa, and the eleventh to be an unincorporated, voluntary association, including the ten named defendants among its members.

The issues are complicated beyond those normally to be found in the usual action. There are extended discovery proceedings in progress since June 6, 1955, and now awaiting resumption on Oct. 3, 1955, pursuant to order of court. Controversies have arisen between plaintiffs and their counsel since Aug. 29, 1955, which await solution, in respect of which plaintiff, Harry J. Strong, has requested disposition as soon as possible; depositions are pending to preserve testimony and other factors urge the action herein ordered to be taken.

The present engagements of the court to which commitment had been made long prior to this date require con- [fol. 65] tinuous absence of the judge from this division for regular terms of the court, commencing on Sept. 26, 1955, in the Southern Division, Oct. 3, 1955, in the Western Division, Oct. 17, 1955, in the Ottumwa Division, Oct. 24, 1955, in the Central Division, and Nov. 28, 1955, in the Eastern Division of this District.

The variety and number of the problems presented in this action, their complicated nature, the issues involved, the best interests of all persons and parties here affected, and the interests of justice combine to demand that these proceedings may be carried forward to their conclusion with the utmost dispatch. The court recognizes that the expense consequent to the appointment of a special master with general powers should make it the exception rather than the rule and has weighed the cost incident thereto against the benefits to be derived by all concerned, is firmly persuaded that the circumstances described and involved and the peculiar urgency of the many and complex problems require departure from the rule of avoiding the appointment of special masters where possible.

Accordingly, the court must find it to be advisable and necessary in the premises that a reference shall be made to

a special master who shall have and exercise all powers permitted to masters under Rule 53 of the Federal Rules of Civil Procedure and such additional specified powers as later may be conferred upon and delegated to him in that capacity.

It Is Therefore Now Hereby Ordered, That Edward A. Doerr of Davenport, Iowa, be and he is hereby appointed Special Master to have and exercise all powers authorized by Rule 53 of the Federal Rules of Civil Procedure, and that this entire cause be referred to him for such proceed-
[fol. 66] ings as may be necessary, to hear the evidence, to take testimony on any issue herein, to pass on disputed claims, to pass on applications of the parties and to make where necessary special findings of fact and conclusions of law thereon and to report the same to this court, and these powers he shall exercise until otherwise limited by order of this court.

It Is Further Ordered, That the fees and disbursements of the master shall be allowed by the court from time to time and that for the purpose of assuring the payment of his fees and disbursements as related to the services of the special master, except as directed by Paragraph IV of the order of May 23, 1955, herein, there shall be forthwith paid into the registry of this court, $2500.00 by the plaintiffs and $2500.00 by the defendants, which sum shall be paid out to the Special Master upon the order of court for the allowance of fees and disbursements, and that said sum shall be subject to increase from time to time as the necessities of the situation may require.

Signed at Davenport, Iowa, this 21st day of September, 1955.

WM. F. RILEY,
U. S. District Judge.

[fol. 67] (Motion of Plaintiffs to defer Deposit of Funds)

(Filed in U. S. District Court on September 26, 1955)

Comes now Harry J. Strong, Secretary-Treasurer of First Iowa Hydro Electric Cooperative as an individual

layman plaintiff representative of all other plaintiffs in Civil Action No. 1-224 in The United States District Court, Southern District of Iowa, Davenport Division, and by motion moves the Court to defer the requirements of the depositing of a sum of Two Thousand Five Hundred Dollars ($2500.) as ordered by the Court under its order dated September 21, 1955.

1. On September 16, 1955 the plaintiffs filed a motion asking for leave to remove Counsel of Record.

2. On September 2, 1955 in open court plaintiffs informed the Court the Attorneys of Record were discharged by the Plaintiffs.

3. The Order of September 21, 1955 is issued at a time when plaintiffs are without counsel and plaintiffs are unable to ascertain their legal right from competent attorneys having the right to examine all records of this case and properly advise the plaintiffs.

4. The matter before the Special Master is matter restricted in use by the court in such a manner that plaintiffs cannot be properly legally advised until new counsel become of record.

5. That plaintiff as a mere layman makes this in the form of a Motion so that it will be a part of the official record.

[fol. 68] 6. That the plaintiff makes this motion because the order demands ten times as much from the plaintiffs as is demanded of any one of the defendants while the record will show that the need for a Special Master to preside over depositions arose out of acts of the defendants and not of the plaintiffs and further that the deposition which is calling for all of this money is merely a repetition of written interrogatories and answers and a repetition of the books and records as furnished under the Courts Order for the production of books and records.

7. That as layman without counsel it is inconceivable that the non-profit Cooperative Association or its member should advance funds or pay the expense of the defendants

in their taking of depositions which were not requested by plaintiffs and/which have no value to the plaintiffs.

8. As layman it looks like the Court is requiring plaintiffs to pay half of the costs of information already known to the defendant which defendant is compelling plaintiffs to repeat in a most extravagant and costly manner and in furtherance of the defendants avowed purpose to break this non-profit Cooperative Association.

9. For the above reasons the plaintiffs feel they must have advice of counsel on this matter and the Courts own records indicates plaintiffs now have no attorneys of record trusted by plaintiffs.

Therefore, it is requested that this matter of depositing funds be deferred until such time as plaintiffs are allowed to substitute counsel and be advised on this matter.

Dated this 26th day of September, 1955.

HARRY J. STRONG,
Secretary-Treasurer.
First Iowa Hydro Electric Cooperative.

[fol. 69] (Order of District Court denying Motion of Plaintiffs to defer Requirement of Deposit.)

(Filed in U. S. District Court on September 27, 1955.)

Plaintiff Harry J. Strong has filed a motion, on behalf of himself as an individual and as "representative of all other plaintiffs," to defer the requirement of the deposit of $2500 by plaintiffs as ordered by this court on Sept. 21, 1955, asking leave to defer such deposit until determination of plaintiffs' motion for leave to remove counsel, filed Sept. 16, 1955.

The court's order of Sept. 21, 1955, became necessary for the reasons therein stated which include plaintiffs' motion of Sept. 16, 1955, and other related problems.

There is no restriction upon the right of plaintiffs to seek the advice and assistance of counsel as to their controver-

sies between themselves and their counsel named in their motion of Sept. 16, 1955.

The powers of the master appointed Sept. 21, 1955, are deliberately and intentionally broad and the matter of depositions is but an incident of his powers and duties. The order provides for the continued payments by participating defendants of the costs of discovery depositions conducted by defendants, but provision must be made for other fees [fol. 70] and disbursements of the master related to other subjects generally referred to him, including e.g., the plaintiffs' motion of Sept. 16, 1955, and related matters.

The master's compensation, except as provided in the last paragraph of the order of Sept. 21, 1955, will be presently paid by the parties. It is to assure such payment that the advance deposit is required "forthwith." It is a condition of plaintiffs' going forward with this action that such deposit be made forthwith.

The Clerk will enter the following

Order:

The motion to defer deposit of funds, filed by Harry J. Strong in his own behalf and as representative of all plaintiffs herein on Sept. 26, 1955, having been duly considered, is hereby denied, and plaintiffs are directed to make the deposit of $2500, required by the order of this court on Sept. 21, 1955, to be made "forthwith", by payment into the registry of this court, as a condition of going forward with this action.

Signed at Des Moines, Iowa, this 27th day of September, 1955.

WM. F. RILEY,
U. S. District Judge.

[fol. 71] (Order of Special Master on Motion of Plaintiffs to remove France, France & Nady, et al., as their Attorneys.)

(Filed in U. S. District Court on September 29, 1955.)

It is ordered that the motion of plaintiffs entitled "Motion for Leave to Remove France, France & Nady and

James R. McManus and Allan R. Shepperd as Attorneys for Plaintiffs Herein," as well as any resistance or application which may be filed in response to said motion by said attorneys or any of them shall be heard at the Petit Jury Room, Federal Building, Davenport, Iowa, commencing at 2:00 o'clock P. M. on October 3rd, 1955. For the purposes of said hearing plaintiffs will be privileged to be represented by counsel of their choosing. Because of the allegations of paragraph 17 of the application, counsel for defendants will be privileged to be present at the hearings but may take part therein, if at all, only to such extent as the Special Master may permit in the course of the hearing upon request made.

Dated September 29th, 1955.

EDWARD A. DOERR,
Special Master.

[fol. 72] (Resistance of France, France & Nady, et al., to Motion of Plaintiffs to remove them as Attorneys and Application by Attorneys for Affirmative relief.)

(Filed in U. S. District Court on September 29, 1955.)

Come now France, France & Nady, James R. McManus and Allen R. Shepherd, attorneys of record for plaintiffs in the above entitled cause, and resist the motion filed by plaintiffs September 18th, 1955, in which plaintiffs seek to remove said attorneys, and in which plaintiffs also ask that the matter of fixing attorneys' fees be postponed and reserved until the conclusion of the case, and for resistance and answer to the allegations of the motion state:

1. Said attorneys admit that First Iowa Hydro Electric Cooperative is an Iowa corporation maintaining its principal office in Muscatine, Iowa; that Frank A. E. Gillmor is its president, Carl J. Mitzner is Vice President, Harry J. Strong is Secretary-Treasurer, and that the three men named, together with Harry Imel and P. H. Naber, constitute the Board of Directors of First Iowa Hydro Electric

Cooperative as alleged in paragraphs 1 to 6 inclusive, of said motion.

2. These attorneys admit they are attorneys of record for the above named plaintiffs in the above entitled cause and have no doubt that plaintiffs have found it impossible to retain any additional, reputable lawyers to represent them in this action, as alleged in paragraph 7 of said motion, although they have certainly tried to do so.

[fol. 73] 3. These attorneys admit the allegations of paragraph 9 of the motion and allege that France, France & Nady were retained in November, 1953, and that James R. McManus and Allen R. Shepherd were retained by the plaintiffs in January, 1954.

4. The attorneys mentioned above deny that they were employed by virtue of or on the basis stated in the purported resolution alleged to have been adopted by the board of Directors of the Cooperative, as stated in paragraph 9 of said motion of plaintiffs, although it is admitted that plaintiffs would be [leable] for court costs and "out of pocket" expenses of these attorneys. These attorneys further state that the purported resolution was brought to their attention long after they had been employed and after this action was instituted and that plaintiffs were promptly advised that [is] would not affect the contracts of employment which had been [make] long prior thereto and that these attorneys were not bound thereby and did not recognize the right of the cooperative to attempt to revise the terms of employment of these attorneys by such means. Thereafter, these attorneys continued to appear for and act in behalf of these plaintiffs at all subsequent proceedings in this litigation and with the knowledge and acquiescence of plaintiffs.

5. These attorneys admit that plaintiffs have paid them some money, in accordance with their contracts, but not as much as $5,000, and plaintiffs have not paid all of said attorneys' hotel, travel and meal expenses incurred in connection with the action and the plaintiffs and each of them are still indebted to these attorneys on account of "out of pocket" expense paid or incurred by them for those items, as well as long distance telephone calls, for which they have

not been reimbursed. These attorneys demand strict proof of the allegations of paragraph 10 of said motion and deny the truth of the allegations set forth therein.

6. These answering attorneys deny that they have made demands for money over and above expenses, repeatedly, although they do admit they have demanded that money be paid to them from time to time, in accordance with their [fol. 74] contracts of employment. It is admitted that J. R. McManus wrote a letter to "Harry J. Strong containing the sentence set forth in paragraph 11 of the motion, and that after three letters upon the subject some money was paid to McManus in advance in Des Moines before he went to Davenport to participate in taking depositions on June 5th, 1955, the money being received at 9 o'clock P. M. on June 4th, 1955.

7. Those attorneys deny the allegations set forth in paragraph 12 of said motion and state that at no time have they refused to perform any actions in furtherance of this action, and on the contrary, allege that they have at all times diligently protected and assiduously safeguarded the rights and interests of the plaintiffs with respect to this law suit and all proceedings connected with it.

8. The answering attorneys deny the allegations contained in paragraph 13 of said motion, and specifically deny that they have made a demand upon plaintiffs for the payment of $10,000.

9. The answering attorneys deny the statements set forth in paragraph 14 of said motion.

10. The answering attorneys deny the claims made in paragraph 15 of said motion but they do admit they have resented and prevented the unwelcome, attempted intrusion of unknown and uninvited "outsiders" into a law suit in which the attorneys of record have devoted twenty-two months of their time and effort.

11. These answering attorneys deny the statements contained in paragraph 16 of the motion, although admitting that McManus has been to Chicago since August 24, 1955,

and while there talked to an engineer, and an investment banker.

12. These attorneys admit that they have stated that the strategy of the opposition was to break plaintiffs of funds to continue said law suit as alleged in paragraph 17 of said motion, but allege that they have not succeeded in doing so. These attorneys deny that they have demanded the payment of the $10,000, but in any event, that sum was not part of the general assets of plaintiffs corporation but was a trust fund, so that the release of the trust fund to their attorneys would not constitute a furtherance of de- [fol. 75] fendants' strategy, as the money did not belong to plaintiffs. We believe plaintiffs are committed to the philosophy that it is cheaper to attempt to discharge lawyers than to pay them money provided for that purpose by third parties interested in the success of the litigation, although such action is in breach of trust, in violation of their agreements and amounts to a fraudulent conversion of trust funds.

13. These answering attorneys allege that they have at all times discharged their responsibilities to their clients in this case to the best of their respective abilities, at great loss and [sacrofice] to themselves, and have on all occasions conducted themselves with respect to plaintiffs and the law suit in strict accordance with the highest standards of professional ethics and traditions. The statement of plaintiffs in paragraph 18 of the motion that they have lost faith in their attorneys is an after thought which never entered their heads until they came into possession, through fraud and deceit and false representations, of certain funds from which they were to make payments to these attorneys, and prior thereto they were lavish in the praise of the ability of these attorneys and their conduct in connection with this suit in behalf of plaintiffs and on numerous occasions expressed their entire satisfaction with these attorney's services, to these attorneys and others. These attorneys therefore, deny that the assertions in said paragraph 18 are made in good faith.

14. In response to the statements contained in paragraph 19 of said motion, these attorneys admit that J. R.

McManus told the plaintiffs that these attorneys possessed a greater interest in the law suit than the individual plaintiffs and that the statement is true, but deny the conclusions "thus endeavoring to appropriate this cause of action unto themselves, regardless of the rights and welfare of the plaintiff" which statement is pure "balderdash." Furthermore, these attorneys have never asserted any interest in conflict with or detrimental to the rights and interests of these plaintiffs.

[fol. 76] 15. These answering attorneys admit that in July, in the Mississippi Hotel in Davenport Attorney James R. McManus did repel a vicious and unprovoked assault on him by Harry J. Strong, general manager and Secretary-Treasurer of First Iowa Hydro Electric Cooperative, using no more force than was necessary for his own protection but deny that serious physical injury was caused Harry J. Strong thereby.

16. These attorneys deny paragraph 21 of plaintiffs' motion.

17. These answering attorneys admit that they have refused to work with other attorneys not approved by them and that the remaining statements contained in paragraph 22 are substantially correct, and by way of further explanation state that plaintiffs were told they could not change the lawyers of record and substitute counsel unless and until they either paid or secured the original attorneys employed in the case for services and expenses to date and that plaintiffs were not willing or able to do so, and furthermore, that because of the terms of their employment and their interest in the subject matter of this suit no other lawyers could be employed in their stead, or without the consent of these present attorneys of record.

18. In answer to the statements alleged in paragraph 23 of said motion these answering attorneys deny that there was anything unethical about their action in filing a motion to quash the unauthorized, and now withdrawn, appearance of the law firm of Bell Farrar and Scott, of Rock Island, Illinois, for the reasons stated in our motion to quash and appearance filed in this case which motion is hereby referred to and made a part hereof.

19. That these answering attorneys admit that the plaintiff Harry J. Strong on September 2, 1955, made a statement in their hearing as to their alleged discharge and they deny the statements in paragraph 24 of said motion that these attorneys have no standing in this court at this time and also deny the statement that these attorneys have no interest which will allow them to bring any action to protect themselves in Civil Action No. 1-224 in this court. These answering attorneys allege that plaintiffs are now [fol. 77] represented by counsel of record in this case and cannot appear both by counsel and personally, in their own behalf, and they have no standing in this court while they are represented by counsel of record. These answering attorneys lack sufficient information to form a belief as to the truth of the remaining statements in said paragraph 23 and therefore deny each and all of said statements on information and belief and demand strict proof thereof.

20. That these answering attorneys admit that the amount of their fees chargeable against the plaintiffs might be increased on the successful conclusion of the suit, but that in all other respects these answering attorneys deny each and all of the statements in paragraph 25 of plaintiffs said motion.

21. In response to the averments contained in paragraph 26 of said motion these attorneys state that the entire unpleasant situation which exists was created by plaintiffs; that our association with plaintiffs by reason of their fraud and perjury appears now to have become almost intolerable; that the corporation is insolvent and plaintiffs are unwilling and unable to pay or secure us for fees and expenses, nevertheless, unless and until we are paid we are not willing to step out of the case, leaving its further prosecution to lawyers whom we do [no] approve. The statement that the determination of our fees is reserved until the completion of the trial is an untrue conclusion, because we are entitled to be paid or secured at this time, if any substitution of counsel is to be allowed.

22. That these answering attorneys concur in the suggestion in paragraph 27 of plaintiffs motion that oral tes-

timony be taken on the issues of fact raised by plaintiffs' motion and this resistence thereto.

Wherefore, these answering attorneys pray:

1. That the plaintiffs' prayer that these attorneys be stricken from the records as attorneys of record in this cause be denied.

2. That if any substitution of counsel is to be permitted [fol. 78] that as a condition precedent to such substitution that our compensation for services and expenses to date be fixed, allowed and paid or adequately secured.

3. We ask that oral testimony be taken on controverted issues of fact.

Application for Affirmative Relief.

Come now France, France, & Nady and James R. McManus and Allan R. Shepherd, attorneys of record for plaintiffs in the above entitled cause, and respectfully petition and pray to the court that they may be granted relief in this proceeding for the reasons and upon the [graounds] hereinafter set forth:

1. These attorneys were employed by the plaintiffs to commence and to prosecute the above entitled cause, France, France, & Nady being employed in November, 1953, and James R. McManus and Allan R. Shepherd being employed in January, 1954.

2. That under and by virtue of the terms of the contracts of employment and the contingent fee character of the agreements concerning the ultimate compensation for their services, and by reason of the services performed by them in behalf o plaintiffs in connection with this suit, these attorneys, have an interest in the subject matter of this law suit and have a power coupled with an interest by reason of which they are entitled to continue to prosecute this suit and to earn the contingent fee contemplated by their contract of employment.

3. That on or about August 1, 1955 the plaintiff First Iowa Hydro Electric Cooperative case into possession of

the sum of $15,000. in trust, nevertheless, for certain uses and purposes and said funds were received by said cooperative for specific purposes and impressed with a trust in accordance with the contract and agreement of said parties. That the funds were advanced as follows, $5,000 by Seth Gooder, $5,000 by Joseph R. Condon and $5,000 by Lloyd Drexler, all of whom were and are citizens and resi-
[fol. 79] dents of the State of Illinois.

4. That Harry J. Strong, General Manager, Secretary-Treasurer of the Cooperative mentioned above acted for and in behalf of the Cooperative in connection with the solicitation and agreement with respect to the advancement of the three sums of $5,000 each mentioned above. That it was agreed between said Cooperative and the three individuals named that said sum of $15,000 was not to be used by plaintiffs unless and until plaintiffs had raised and had in their possession an additional sum of $10,000; that no part of said $25,000. when raised, should be used to pay any of the personal or living expenses of the said Harry J. Strong, but only for attorney fees and expenses incidental to the continued prosecution of this law suit; that of the sum of $15,000 advanced by the three individuals above named $10,000 thereof was to be used forthwith to pay services and expenses of France, France, & Nady, James R. McManus and Allan R. Shepherd, $5,000 was to be paid to France, France, & Nady and $5,000 was to be paid to James R. McManus and Allan R. Shepherd, as soon as plaintiffs raised the total sum.

5. That notwithstanding said agreement and at the time said agreement was made the said Harry J. Strong, although pretending to agree with the terms thereof, entertained the secret intent and purpose of not carrying out the agreement or performing the trust, but he simply pretended to agree to hold said funds in trust and to utilize them for the uses and purposes aforesaid in order to deceive and defraud the said Seth Gooder, Joseph P. Condon & Lloyd Drexler, and the persons intended to be benefitted by said trust. There was no mutuality of obligation or consent or meeting of minds between Seth Gooder, Joseph P. Condon, Lloyd Drexler and the Corporation mentioned above

because of the secret intent, deceit and fraud which was practiced upon Gooder, Condon & Drexler as aforesaid.

6. That the said Gooder, Condon, and Drexler trusted the said Harry J. Strong at the time the aforesaid agreement was made, and the trust created, and/were deceived [fol. 80] by him and believed he would perform the agreement and trust and utilize said trust fund according to the conditions imposed upon it and the cooperative and Harry J. Strong but at no time did the latter have any good faith intent to carry out said agreement or perform the trust.

7. That by reason of the fraudulent statement and/representations of the said Harry J. Strong and relying thereon and being deceived thereby the said Gooder, Condon, and Drexler were induced to advance said $15,000 believing that the funds would be devoted to the uses and purposes for which they were intended and had they not so believed, relied and trusted they would not have advance and paid said sum of money as aforesaid, That the said Gooder, Condon & Drexler, received no consideration or anything of value for said funds. That after the plaintiffs came into possession of said sum of $15,000 they repudiated the trust and refused to perform and carry out their agreement and on the contrary said funds were turned over by the Cooperative to the plaintiff Harry J. Strong who is rapidly dissipating said funds and using them for his own needs instead of the purpose for which the funds were intended and the Cooperative and Harry J. Strong have failed, neglected and refused to pay from said sum of $15,000, $5,000 thereof to France, France and Nady and a like sum of $5,000 to James R. McManus and Allan R. Shepherd, although they have stated and represented that they have raised in excess of $25,000 for the purposes mentioned in paragraph 4 hereof.

8. That the plaintiffs are attempting to discharge these attorneys as their attorneys of record in the above entitled cause and are seeking to perpetrate a fraud upon this court and to use this court and this law suit as an instrument for the commission of a fraud and have wholly repudiated and attempted to rescind the agreement by means of which they came into possession of the $15,000 trust fund.

[fol. 81] 9. That by reason of the foregoing facts, if the said Harry J. Strong claims that he was acting [honesly] and in good faith, in connection with said transactions by means of which said funds come into possession and control of plaintiffs, a trust was created and a contract for the benefit of these attorneys was entered into, and if he was acting in bad faith, a constructive trust arose, and said funds are, therefore, held in trust, in any event, and to permit their retention by the plaintiffs under these facts, and after a repudiation of the trust, would result in their unjust enrichment, inasmuch as it was never intended that said funds should be commingled with or become part of the assets of said Cooperative, or be used for its general purposes, or Harry J. Strong's private needs, but all of the $25,000 trust fund was to be used only for the purposes set forth in paragraph 4 hereof.

10. That by reason of the foregoing facts the plaintiff First Iowa Hydro Electric Cooperative and its officers and directors have received and not hold in trust the $15,000 mentioned above which they are using in breach of their agreement and in violation of the terms and conditions of the trust, and but for the protection of this court said funds will be wholly dissipated and used for purposes other than those for which they were intended, that this court should impress said funds with a trust and declare them to be held in trust by the First Iowa Hydro Electric Cooperative and its officers who are plaintiffs in this suit and they should be ordered to account to this court in which they are now seeking to obtain relief.

11. That these attorneys have performed valuable services worth far in excess of the trust fund and in behalf of the plaintiffs since their original employment in this suit, for which they have not been paid or compensated; that they have paid or incurred expenses for hotel, travel, meals, and long distance telephone calls, for which they have not been reimbursed, and that this court should take testimony for the purpose of ascertaining the reasonable value of the services of these attorneys earned to date and as to their [fol. 82] unpaid expenses, and in the event this court, after a hearing, should see fit to remove these attorneys as a condition to permit a substitution of attorneys in their place and stead the plaintiffs should first pay the amount

found to be due these attorneys, plus expenses, or adequately secure the payment thereof.

Wherefore these attorneys pray that this court impress a trust upon the $15,000 fund heretofore mentioned; and declare that the plaintiffs hold said funds impressed with a trust for the use and benefit of the attorneys and such other persons as their interests may appear, and that plaintiffs be required to account for said funds, and to pay [thr] same in to the registry of this court, in trust, that this court fix and allow suitable sums for the attorneys as compensation for the services earned to date and to reimburse them for their unpaid expenses to date as a condition to allowing any change or substitution of attorneys of record in this case and that the court find that these attorneys have an interest in the subject matter of this suit and that this court make such orders as may be appropriate and suitable in the premises to protect the rights and interests of these attorneys, as officers of this court, and as attorneys of records.

FRANCE, FRANCE & NADY,

JAMES D. FRANCE,

XAVIER C. NADY,
First National Bank Bldg.,
Tipton, Iowa.

J. R. McMANUS.

ALLAN R. SHEPHERD,
417 Fleming Bldg.,
Des Moines, Iowa.

[fol. 83] (Motion of Seth Gooder, et al., for Leave to Intervene)

(Filed in U. S. District Court on September 30, 1955)

The United States District Court, Southern District of Iowa, Davenport Division.

First Iowa Hydro Electric Cooperative, et al., Plaintiffs, No. 1-224. vs. Civil.
Iowa-Illinois Gas & Electric Company, et al., Defendants.

Seth Gooder, Joseph P. Condon and Lloyd Drexler move for leave to intervene in this action in order to assert the

matters set forth in their proposed complaint, of which a copy is hereto attached, on the ground that these intervenors and each of them have a substantial interest in the subject matter of the action, that the representation of said interest by the original plaintiffs is inadequate, that the interest of these interveners and the main action have questions of law and fact in common and that the intervention of these intervenors will not to any substantial extent delay or prejudice the adjudication of the rights [of the rights] of the original parties.

ARTHUR G. FIELD,
208 S. LaSalle St.,
Chicago, Illinois.

GEORGE E. DONALLEY,
420 Royal Union Bldg.,
Des Moines, Iowa.

Attorneys for the Intervenors.

[fol. 84] Complaint of Intervenors Seth Gooder, Joseph P. Condon and Lloyd Drexler.

The United States District Court, Southern District of Iowa, Davenport Division.

First Iowa Hydro Electric Cooperative, et al., Plaintiffs, No. 1-224. vs. Civil.
Iowa-Illinois Gas and Electric Company, et al., Defendants.

1. The intervenors, Seth Gooder, Joseph P. Condon and Lloyd Drexler, and each of them are citizens and residents of the State of Illinois and all of the parties plaintiff in the above entitled cause are citizens and residents of the State of Iowa and Fr[illegible]ce, France and Nady, James R. McManus and Allan R. Shepherd are likewise each and all of them citizens and residents of the State of Iowa and each of the individual intervenors named above have a claim or interest in this controversy in excess of $3,000 exclusive of interest and costs and therefore diversity of citizenship exists between these intervenors and all other persons involved in the present proceeding in the above entitled cause.

2. That this is an action by the plaintiffs named in the caption hereof against the defendants named therein in which the plaintiffs seek to recover treble damages under the provisions of what are commonly known and referred to as the Sherman Act and the Clayton Act being acts of the Congress of the United States and France, France and Nady, James R. McManus and Allan R. Shepherd are now and have been since the institution of said suit in this court attorneys of record herein for and in behalf of the plaintiffs.

3. These intervenors would show that the plaintiffs in this action are the officers of the above named First Iowa Hydro Electric Cooperative and that these intervenors have for the past number of years rendered services and contributed moneys to the said First Iowa Hydro Electric [fol. 85] Cooperative to further the aims and purposes for which said cooperative was organized and in the past have advanced large sums of money to said cooperative, the intervenor, Joseph P. Condon having paid out or advance sums in excess of $85,000 and the cooperative is indebted to Seth Gooder by reason of advances and contract indebtedness in the amount of approximately $65,000.

4. On or about the 25th day of July 1955 these intervenors at the solicitation and request of the First Iowa Hydro Electric Cooperative acting through Harry J. Strong, Secretary, Treasurer and General Manager, advanced to First Iowa Hydro Electric Cooperative the sum of $15,000 on the express agreement and condition that said sum together with an additional sum of $10,000 which was to be raised by First Iowa Hydro Electric Cooperative was to be placed in a special bank account to be used only for the payment of attorneys fees, court costs, and other expenses incidental to and growing out of the prosecution of the above entitled cause in this court and it was also expressly agreed that no part of said funds advanced as aforesaid by these intervenors to said cooperative should be utilized for the living expenses or other personal needs of the above mentioned Harry J. Strong and that no part of said $15,000 was to be used until an additional $10,000 had been raised by said cooperative. It was further stipu-

lated and agreed by [an] between these intervenors and the First Iowa Hydro Electric Cooperative at the time the arrangements were made for the advancement of said $15,000 fund that $5,000 of said fund was to be paid to France, France and Nady, $5,000 thereof was to be paid to James R. McManus and Allen R. Shepherd the attorneys mentioned above to apply to their office overhead, travel, living and personal expenses incurred during the prosecution of the above entitled cause and said fund was paid to First Iowa Hydro Electric Cooperative upon that condition and accepted by the First Iowa Hydro Electric Cooperative upon that basis.

5. These intervenors would further show that at the time of making the above mentioned payments of $15,000 [fol. 86] the said First Iowa Hydro Electric Cooperative through its Secretary, Treasurer and General Manager, Harry J. Strong, represented to these intervenors that the services of the above mentioned attorneys had been satisfactory and that great progress had been made in this cause of action to date and that said attorneys had diligently and carefully protected the rights and interests of the plaintiffs in said litigation at all times and that but for said representations and their belief in and reliance upon such representations by these intervenors they would not have advanced the sum of $15,000 by these intervenors the aforesaid cooperative through its Secretary, Treasurer and General Manager, Harry J. Strong, promised these intervenors that said cooperative and its officers would faithfully perform and carry out the aforesaid conditions on which said advancement was made but that in truth and in fact said General Manager, Harry J. Strong made said promise with no intentions of ever performing it and said Strong made said promise to these intervenors wilfully and fraudulently and with the knowledge that these intervenors relied on said promise and that by means of said false and fraudulent promise and other false and fraudulent representations said cooperative through its Secretary, Treasurer and General Manager, Harry J. Strong procured possession of said funds and said cooperative and its officers will be unjustly enriched if permitted to keep

and retain said funds in breach and in violation of conditions on which they obtained them.

7. That thereafter said General Manager Strong has represented to these intervenors that said cooperative has raised the additional sum of $10,000 pursuant to its agreement above mentioned and now has on hand a total sum of approximately $29,000 in cash hidden at some undisclosed place but that in furtherance of the aforesaid fraudulent scheme said cooperative and its various officers have failed and refused to perform the aforesaid conditions or to carry out the trust imposed on said funds but have applied a substantial amount of said funds to the personal needs and [fol. 87] profit of said Harry J. Strong and to various other purposes not intended by these intervenors, the exact details of which are unknown to these intervenors.

8. That these intervenors by reason of the indebtedness heretofore mentioned which is [oweing] by the First Iowa Hydro Cooperative to them have a substantial interest in the successful out come of this litigation. That the cooperative has no funds or assets from which these intervenors may be repaid for their advances unless said lawsuit is prosecuted to a successful final conclusion. That the present attorneys for the plaintiffs have the complete confidence of these intervenors and these intervenors express the belief that said attorneys should be permitted to continue in and to complete the prosecution of said lawsuit and that the plaintiffs in said cause now seek to substitute their present attorneys as a furtherance of said cooperative's fraudulent scheme to unjustly enrich itself and avoid payment in conformance with the trust created by the parties. That these intervenors believe that if the present attorneys are continued in charge of said litigation the rights and interests of these plaintiffs and of these intervenors will be fully and competently safeguarded and protected.

9. That by reason of the foregoing statements and allegations the First Iowa Hydro-Electric Cooperative and its officers have received and now hold in trust the $15,000 mentioned above which they are seeking to use in breach of their agreement and in violation of the terms and condi-

tions of the trust and that but for the interposition and protection of this court said fund will be dissipated and used for purposes other that for which it was intended that they should be used and that this court should impress said funds with a trust and declare them to be held in trust by the First Iowa Hydro Electric Cooperative and its officers who are plaintiffs in the above entitled cause and they should be compelled to account to this court in which they are seeking relief and to these intervenors for said funds.

[fol. 88] 10. That these intervenors both orally and in writing have demanded of said plaintiffs in the above entitled cause that they utilize said funds for the sole purposes for which they were advanced by these intervenors or return all of said funds to these intervenors without delay but, notwithstanding said demands of these intervenors and in repudiation of the trust the plaintiffs have wrongfully and willfully kept and retained said funds for their own use and to divert them from the purposes for which they were intended.

Wherefore These intervenors pray that this court make and enter an order impressing said $15,000 with a trust and that this court declare the plaintiffs in the above entitled cause hold said funds impressed with a trust and that said plaintiffs be ordered to account for said funds and to pay the same into the office of the clerk of this court for the use and benefit of these intervenor and all interested parties as their interests may appear. The intervenors ask this court to grant such other and further relief as may be deemed suitable in the premises to protect the rights and interests of these intervenors.

ARTHUR G. FIELD,
208 S. La Salle St.
Chicago, Illinois.

GEORGE E. DONALLY,
420 Royal Union Building,
Des Moines, Iowa.

Attorneys for Intervenors.

State of Illinois,
Cook County—ss.:

I, Joseph P. Condon, being first duly sworn on oath depose and said that I am one of the intervenors named herein and that I have read the foregoing complaint in intervention and know the contents thereof and am familiar with the facts therein stated and the allegations contained therein are true as I verily believe.

JOSEPH P. CONDON.

[fol. 89] Subscribed before me by the said Joseph P. Condon on this 22 day of September, 1955.

(Seal)

JOHN M. SHANAHAN,
Notary Public in and for Cook County, Illinois.

[fol. 90] (Order of Special Master on Motion of Plaintiffs to remove France, France & Nady, et al., as their Attorneys)

(Filed in U. S. District Court on October 5, 1955)

The above entitled cause came on to be heard in accordance with prior orders on the 3rd day of October, 1955 on the Motion For Leave To Remove France, France & Nady And James R. McManus And Allan R. Shepherd As Attorneys For Plaintiffs Herein filed in this case by plaintiffs and on the paper filed by said attorneys entitled "Resistance To Motion To Remove Attorneys And Application By Attorneys For Affirmative Relief." James D. France, Xavier C. Nady, James R. McManus and Allan R. Shepherd (being the attorneys of record for plaintiffs whom plaintiffs propose by their said motion to dismiss) appeared in person. Plaintiffs, although called, failed to appear in person or by attorney and were declared to be in default and are hereby so adjudged. Said attorneys thereupon introduced evidence and rested.

The matter heard is adversary in nature, although it is incidental to the main case and is heard on motion. I

therefore make findings of fact and state conclusions of law in an accompanying opinion. Such findings and conclusions will also make a review of this order more convenient if that is desired.

[fol. 91] It is ordered:—

1. The said motion of plaintiffs is sustained subject to the condition hereinafter stated.

2. The said condition is that plaintiffs shall, before dismissing their said attorneys, pay to James D. France and Xavier C. Nady, the sum of $100,000.00, as attorneys' fees, and to James R. McManus and Allan R. Shepherd, jointly, the further sum of $100,000.00, as attorneys' fees, except as plaintiffs may be relieved from such prior payment pursuant to paragraph 3 below.

3. Plaintiffs are granted leave, upon application, to reopen this matter for the purposes of showing that they have no means sufficient to pay said sums and of applying for a consequent reduction thereof upon just terms.

4. In the event that the Motion for Leave to Intervene filed herein by Seth Gooder, Joseph F. Condon and Lloyd Drexler shall be sustained and a fund shall be brought into the court pursuant to their Complaint of Intervention, then such fund shall thereupon stand impressed with a trust for payment of the costs of prosecuting this action, including the fees of said attorneys.

5. Pending performance of said condition and the consequent dismissal of said attorneys they are required, fully and effectively, as plaintiffs' attorneys, to continue the representation of plaintiffs herein.

6. Except as herein provided said motion of plaintiffs and said resistance and application of said attorneys are overruled and denied.

Dated October 5th, 1955.

EDWARD A. DOERR
Special Master

[fol. 92] (Opinion of Special Master on Motion of Plaintiffs to remove France, France & Nady, et al., as their Attorneys)

(Filed in U. S. District Court on October 5, 1955)

Plaintiffs have moved for leave to dismiss their attorneys. Their motion will be considered as one for substitution of counsel, i.e. a motion to substitute plaintiffs as attorneys pro se. Plaintiffs' attorneys have filed a resistance to the motion and an application for affirmative relief. Hearing has been had on the motion and the responsive papers filed by the attorneys.

The motion alleges disloyalty and other faults by the attorneys in the representation of plaintiffs. The position taken by the attorneys is summarized as follows:

1. They deny any fault in their professional relation with plaintiffs.

2. They allege that plaintiffs received from one Gooder, Condon and Droxler the sum of $15,000.00 upon express directions to apply the same in payment of costs of the present litigation (including, specifically, payment of $10,000.00 thereof to the attorneys) and that plaintiffs promised so to apply the sum but failed to do so.

3. They allege that they have an interest in the subject matter of the action under the terms of an indefinite contingent fee contract.

[fol. 93] 4. They pray: (a) that a trust be impressed on the $15,000.00 sum, and that plaintiffs be required to account for that sum and pay it into court; (b) that provision be made for the payment of their fees and expenses in their employment; (c) that the court find them to have an interest in the subject matter of the action; and (d) that the court make orders appropriate for their protection.

Plaintiffs defaulted at the hearing. The attorneys, however, presented their case.

I make the following findings:

I. Plaintiffs' attorneys have served plaintiffs loyally, zealously and effectively in the preparation for and prosecution of this action. No cause exists for their discharge.

II. The reasonable value of the services of plaintiffs' attorneys to and including August 31, 1955 (the date referred to in the testimony), is as follows:—

James D. France and Xavier C. Nady, jointly—$100,000.00.

James R. McManus and Allan R. Shepherd, jointly—$100,000.00.

III. The attorneys were employed upon an oral contract providing in substance that their out of pocket expenses in connection with the action, including expenses of travel and subsistence while away from home, should be reimbursed to them and that they should be paid further sums as fees, from time to time, if that could conveniently be done by plaintiff First Iowa Hydro Electric Cooperative, but that otherwise their compensation should be contingent upon success in the litigation and should bear a proportional, but not specifically defined, relation to the amount recovered by plaintiffs in the litigation.

IV. On or about August 1, 1955, plaintiff First Iowa Hydro Electric Cooperative received the sum total of [fol. 94] $15,000.00 from strangers to the litigation. The sum was paid upon the express direction and condition that it be held and used solely for expenses of the litigation and, more specifically as to a part of the sum, that $5,000.00 be paid to James D. France and Xavier C. Nady, as attorneys' fees, and a further $5,000.00 to James R. McManus and Allan R. Shepherd, as attorneys' fees. Said sum of $15,000.00 was received and accepted on said terms. The evidence to support the findings in this number IV is clear, satisfactory and convincing.

V. The sum of $15,000.00 paid and received as stated in number IV has not been used or applied for the stated purposes in whole or part.

VI. There is no sufficient showing in the record what sums are due plaintiffs' attorneys as a balance of account for out of pocket expenses paid by them; but the amounts so paid by said attorneys, respectively, exceed the total

sums paid to said attorneys, respectively, by plaintiffs in connection with the employment.

I state the following conclusions of law:—

A. Plaintiffs are privileged to discharge their attorneys regardless of fault and regardless of the contingent nature of the employment.

B. The privilege is qualified however, in that the attorneys can be dismissed only upon application for substitution and the entry of an order upon such application.

C. The privilege is further qualified in that the entry of the order of substitution is not a mere formality. On the contrary, the attorneys being without fault, the order for substitution should be conditioned upon payment by plaintiffs of the fees and disbursements of the attorneys in their employment by plaintiffs.

[fol. 95] D. If plaintiffs do not have means for full payment, the order of substitution should be conditioned upon payment only to the extent of plaintiffs' means. The burden of proof in this respect is on plaintiffs.

E. The basis of plaintiffs' liability to their attorneys is damages for breach of contract and the measure of damages is the reasonable value of the attorneys' services.

F. The only appropriate and presently useful measure for safeguarding the interest of the attorneys is by way of condition upon the order of substitition.

A little discussion will make more clear the bases for this opinion and the accompanying order.

It is clear that plaintiffs are privileged to discharge their attorneys by the orderly procedure of a motion and order for substitution. It is equally clear that the order should be conditioned upon payment of the fees and disbursements of the attorneys to the extent of the means possessed by plaintiffs. The client must not be bound forever to an attorney by the imposing of a condition of payment which the client, for lack of means, can not perform.

The confidential relationship between the two of them is inconsistent with any such bond. For the reasons stated I have, in spite of plaintiffs' default, left it open for them to show their inability to comply with the condition imposed in this case.

The attorneys have asked for further relief which has not been accorded them. Specifically, the attorneys have asked that the $15,000.00 sum referred to in the findings be ordered brought into court and that it be impressed with a trust for their benefit. But there is no precedent for any such action. The protection afforded the wrongfully discharged attorney in such proceedings as these may, upon the basis of precedent, consist of a condition upon the order for substitution; or the imposition of a [fol. 96] lien or charge on the sum or property recovered by the client; or the payment of the attorneys' claims out of any fund in court which is the client's property. (See, generally, the cases cited at 7 CJS Attorney and Client sec. 122 and those digested at 124 ALR 725.) In this case the attorneys ask me to go farther, to bring a fund into court—presumably by an order which would be the basis for contempt process. Lacking precedent for any such order, I am foreclosed from entering it. If such a provision is asked merely as an additional condition, the answer is ready that it would be only additional verbiage. If the present condition does not bring actual payment (to the extent of plaintiffs' means) an additional condition would not serve the purpose.

Additional reasons—for instance delay in the main case—may possibly exist for denying an order to bring the $15,000.00 fund into court. Any studied consideration of such additional reasons is reserved until submission of the Motion for Leave to Intervene which is now pending in this action and which has the purpose of bringing the same fund into court. My purpose is to avoid pre-judgment.

The accompanying order provides that if, pursuant to the intervention proceedings, the $15,000.00 fund shall be brought into court, then the fund will be subjected to the attorneys' claims. No further provision seems to me to be justifiable.

In the present state of affairs there is no reason to establish a lien or charge in favor of the attorneys against the judgment, if any, which plaintiffs may ultimately recover in this action. As matters now stand, the attorneys will be paid in full before a substitution, let alone a judgment. If plaintiffs show themselves unable to pay in full, the establishment of such a lien or charge may be considered at the time of such showing.

[fol. 97] The attorneys freely recognize their continuing obligation to serve plaintiffs in this action until the order for substitution has become unconditional. (See paragraphs 19 and 21 of their resistance.) My order also takes note of that obligation. There is accordingly no subsisting reason in plaintiffs' relationship with their attorneys for the further postponement of proceedings in this cause.

No question has been made in this proceeding as to an attorney's statutory lien.

An accompanying order gives effect to this opinion.

Dated October 5th, 1955.

EDWARD A. DOERR
Special Master

[fol. 98] (Order of Special Master permitting Plaintiffs to submit Written Statements on Motion of Seth Goodier, et al., for Leave to Intervene.)

(Filed in U. S. District Court on October 5, 1955.)

The interests of plaintiffs and their counsel of record may be adverse with respect to the Motion For Leave To Intervene filed in this matter by Seth Goodier, Joseph F. Condon and Lloyd Drexler. It is therefore ordered that plaintiffs may, at their election, for themselves or by counsel of their own choosing, submit brief, written statement in support of or in opposition to said motion. Any such statement shall be submitted to the Special Master on or before October 12th, 1955.

Dated October 5th, 1955.

EDWARD A. DOERR,
Special Master.

[fol. 99] (Order of United States Court of Appeals for the Eighth Circuit denying Motion for Leave to file Petition for Mandamus.)

(Filed in U. S. District Court on October 6, 1955.)

United States Court Of Appeals

For The Eighth Circuit

September Term, 1955 Monday, October 3, 1955

First Iowa Hydro Electric Cooperative, F. A. E. Gillmor, Carl J. Mitzner, Harry J. Strong, Harry E. Imel, and P. H. Naber, Petitioners,

No. 15,436. vs.

United States District Court for the Southern District of Iowa, Davenport Division.

Before John B. Sanborn, Circuit Judge and Robert C. Bell, District Judge.

In this matter there is this day presented to the Court a motion for leave to file petition for mandamus and injunction and for an order staying proceedings in First Iowa Hydro Electric Cooperative, et al., Plaintiffs, vs. Iowa-Illinois Gas and Electric Company, et al., Defendants, which is pending in the United States District Court for the Southern District of Iowa. Mr. Harry J. Strong, of 1011 E. High Street, Davenport, Iowa, and Mr. Harry E. Imel, of Muscatine, Iowa, P. O. Box 486, two of the plaintiffs, appeared on their own behalf. No notice of the motion for leave has been served upon anyone and it does not appear that the issuance of a writ of mandamus or a stay of proceedings would be in aid of the jurisdiction of this Court. After due consideration the said motion for leave to file the petition should be, and is by the Court hereby, denied for want of jurisdiction.

October 3, 1955.

[fol. 100] (Affidavit of Prejudice.)

(Filed in U. S. District Court on October 10, 1955.)

State Of Iowa,
County Of Scott—ss.

HARRY J. STRONG, being first duly sworn upon his oath deposes and says:

1.—I am a plaintiff in the above entitled cause and I make this affidavit as a representative of all other individual plaintiffs and as an officer of the First Iowa Hydro Electric Cooperative, the corporate plaintiff in this cause of action.

2.—I believe that the Honorable William F. Riley, Judge of the United States District Court in which this action was commenced and is now pending, and before whom it is to be tried or heard, has a personal bias and prejudice against our project, a hydro electric development on the Cedar River, and the reason for such belief is as follows:

(a) In 1932, Judge William F. Riley rendered an opinion for one Seth Gooder, an individual now seeking to intervene in this action, which opinion was paid for by the said [fol. 101] Seth Gooder, and which opinion advised against a hydro electric project on the Cedar River.

(b) That the Honorable William F. Riley was a member of the law firm of Carr, Cox and Riley in Des Moines, Iowa and that as a member of said firm, had as a principal client, the defendant, Iowa Power and Light Company; that the son of the Honorable William F. Riley is now a lawyer practicing law in Des Moines, Iowa in the law firm of Evans, Cox and Riley, a successor firm to the firm of Carr, Cox and Riley and that a principal client of said law firm, a principal client for which the son of the Honorable William F. Riley now performs legal services, is the defendant, Iowa Power and Light Company.

(c) That on the 2nd day of September, 1955, your deponent and other plaintiffs in this cause of action, filed with the Court, a Petition to Intervene on Rule to Show Cause on the Motion of Attorneys France, France and Nady and

James R. McManus and Allan R. Shepherd to quash the Entry of Appearance of the law firm of Bell, Farrar & Scott; that said Petition brought before the Court the fact that the plaintiffs had no counsel to whom they could, in confidence, turn for advice on their problems.

(d) That subsequent to this 2nd day of September, 1955, the Honorable William F. Riley, issued an Order dated September 6, 1955, an Order dated September 15, 1955, a second Order dated September 15, 1955, another Order dated September 21, 1955, a second Order dated September 21, 1955, and an Order dated September 27, 1955; and that each of the above Orders were Orders which were biased and prejudiced in that they were issued at a time when plaintiffs were without counsel and unable to be fully advised as to their legal rights under each and every Order. Further, that the Order dated September 21, 1955 [fol. 102] is, in the opinion of the plaintiffs, a denial of the plaintiffs of trial by a jury as has been requested in this case in that said Order appointed a new Master with the power to make findings of fact which are province of a jury and which Order, in invading the province of the jury, is a denial of the plaintiffs' constitutional right for a trial by jury.

(e) That said Order of September 21, 1955 appointed a new Master and that the new Master so appointed has in turn issued Orders which were prejudicial and carry out the bias and prejudice which is felt the plaintiffs are faced with in this case; the Orders of the Special Master being more particularly an Order dated September 28, 1955 and a second Order also dated Setpember 28, 1955, and an Order dated September 29, 1955, and an Order dated October 5, 1955. Your deponent feels that the bias and prejudice of the Honorable William F. Riley carry over and may be found also in those acting under him in this matter and the bias and prejudice can be found in each and every Order issued since September 2, 1955 in this matter.

(f) That the Special Master's Order of October 5, 1955 is drawn up in such a manner so that the plaintiffs have no right to have counsel of their own choosing without the acquiescence to an impossible condition of paying off Two Hundred Thousand Dollars ($200,000.), whereas the Court

well knows that the plaintiffs are mere laymen common in statute and operating as a non-profit cooperative.

(g) That your deponent, because of the impossible conditions which now exist in this matter under the Orders issued from September 2, 1955 by the Honorable William F. Riley, and those subordinate acting in his stead, requested of the Special Master that a postponement be granted in [fol. 103] said case to allow new counsel to prepare themselves to properly go forward in the matter. That new counsel contacted, will only enter the case if they have proper time for preparation; that the Special Master advised your deponent to contact Mr. Walker, one of the attorneys for the defendants on the proposition of a postponement; that Mr. Walker has been advised of the plaintiffs' position, but refused or failed to act upon a postponement so it could be had; that the impossible orders now existing by and through the Honorable William F. Riley puts plaintiffs in the position where depositions are to resume on October 10th at a time when plaintiffs will be unrepresented; that the expenses of a depostion are being incurred through a plan made known by the plaintiffs in various pleadings whereby the defendants are attempting to run up the cost and completely break the plaintiffs so they cannot pursue their cause of action, and the biased and prejudicial orders are merely furtherance of defendants' strategy, and plaintiffs now feel unless the Honorable William F. Riley is removed as a Judge in this matter, and that unless this case is assigned to a new Judge with Orders to strike all Orders entered in this case since September 2, 1955, from the record, your deponent and his associates will be denied a fair and impartial trial.

Dated this 10 day of October, A. D. 1955.

HARRY J. STRONG

Harry J. Strong, affiant in the above and foregoing affidavit, being first duly sworn on his oath, states that he has read the foregoing affidavit by him subscribed and that he knows the contents thereof and that the same are true to the [fol. 104] best of his knowledge and belief.

HARRY J. STRONG

Subscribed and sworn to before me this 10 day of October, A. D. 1955.

R. C. RESNICK
Notary Public.

(Notarial Seal)

Certificate Of Plaintiff.

I certify that I am a plaintiff of record in the above entitled cause and that since September 2, 1955 I and all other plaintiffs have completely lost faith in the counsel of record for the plaintiffs of record and have at all times since September 2, 1955 been unrepresented by counsel and that I am unable to obtain counsel to pursue this action until the Court enter an Order allowing me to retain counsel, which Order the Court has continuously refused to enter, and therefore I am not in a position to append to my affidavit of prejudice, a certificate of counsel, but certify to those same facts which would be certified to by counsel if the court would place me in a position where I could retain counsel; those facts are that I am informed as to the proceedings therein as found in the affidavit of prejudice and that such affidavit and application are made in good faith and not for the purpose of hindrance or delay, and further that the plaintiffs at all time want to speed this case to a fast conclusion but can only do so when they have counsel with whom they can place their confidence; that this affidavit of prejudice is being filed because it is felt it is the only means to hasten that day so this action can properly be prosecuted in the Courts before a jury and in trial.

HARRY J. STRONG

[fol. 105] To the Clerk of the above named Court:

Application is hereby made, for the reasons set forth in the foregoing affidavit and certificate, that appropriate proceedings be taken under 28 USC 144, as amended in 1949, to assign another judge to hear the proceeding.

Dated this 10 day of October, A. D. 1955.

HARRY J. STRONG,
For Plaintiffs.

[fol. 106] (Motion of Defendant, Union Electric Power Company, to dismiss Complaint)

(Filed in U. S. District Court on October 11, 1955)

Division I.

Defendants, Union Electric Power Company, through its attorney, Robert H. Walker, moves the Court pursuant to Rule 37(d) of the Federal Rules of Civil Procedure for an order dismissing the plaintiffs' Complaint upon the following ground:

1. For the willful failure and refusal of Harry J. Strong as plaintiff and as officer, director and managing agent of Plaintiff First Iowa Hydro Electric Cooperative, to attend the resumption of the taking of his deposition, on October 10, 1955, at 11:00 o'clock A. M., proper notice thereof having been previously given, and for the willful action of said Harry J. Strong in leaving the hearing room, and in refusing to remain to be interrogated, and for the willful refusal of said Harry J. Strong to testify after being advised by the Special Master to testify.

[fol. 107] Division II.

Defendant Union Electric Power Company through its attorney, Robert H. Walker, moves the Court for an order dismissing plaintiffs' complaint upon the following ground:

1. For the failure of the plaintiffs to deposit into the registry of this Court the sum of $2,500 pursuant to court orders entered September 21, 1955, and September 27, 1955, although the record in this case affirmatively shows that plaintiffs had ample funds with which to make such deposit, and had adequate time in which to comply with such orders.

Division III.

Defendant Union Electric Power Company through its attorney, Robert H. Walker, moves the Court, pursuant to Rule 41(b) of the Federal Rules of Civil Procedure to dismiss the action for failure of plaintiffs to prosecute

this action or to comply with the Federal Rules of Civil Procedure or the orders of the Court, and in the following respects:

1. For the willful failure and refusal of Harry J. Strong as plaintiff and as officer, director and managing agent of Plaintiff First Iowa Hydro Electric Cooperative, to attend the resumption of the taking of his deposition, on October 10, 1955, at 11:00 o'clock A. M., proper notice thereof having been previously given, and for the willful action of [fol. 108] said Harry J. Strong in leaving the hearing room, and in refusing to remain to be interrogated, and for the willful refusal of said Harry J. Strong to testify after being advised by the Special Master to testify.

2. For the failure of the plaintiffs to deposit into the registry of this Court the sum of $2,500 pursuant to court orders entered September 21, 1955, and September 27, 1955, although the record in this case affirmatively shows that plaintiffs had ample funds with which to make such deposit, and had adequate time in which to comply with such orders.

[fol. 109] Defendant, Union Electric Power Company, requests the Court in making any orders of dismissal to make such dismissal with prejudice as against plaintiffs, and all of them, and requests the Court to assess all costs against the plaintiffs and each of them.

Defendant Union Electric Power Company further requests that the foregoing matters be set for hearing upon notice to plaintiffs and their attorneys of record as the Court may prescribe.

UNION ELECTRIC POWER COMPANY,
By Robert H. Walker, Its Attorney.

Joinder by Other Defendants.

The undersigned defendants, having been required by Order of Court entered May 16, 1955, to participate in taking of depositions noticed by defendant Union Electric

Power Company, including the taking of the deposition of Harry J. Strong, and now having been deprived of that right, join in and adopt in all particulars the foregoing motions to dismiss of defendant Union Electric Power Company.

IOWA-ILLINOIS GAS AND ELECTRIC COMPANY,
By Larned A. Waterman, Its Attorney.

[fol. 110] IOWA POWER AND LIGHT COMPANY,
By Howard Steele, Its Attorney.

IOWA SOUTHERN UTILITIES COMPANY,
By Robert Valentine, Its Attorney.

INTERSTATE POWER COMPANY,
By E. Marshall Thomas, Its Attorney.

KANSAS CITY POWER AND LIGHT COMPANY,
By Joseph J. Kelly, Jr., Its Attorney.

IOWA ELECTRIC LIGHT AND POWER COMPANY,

NORTHWESTERN LIGHT AND POWER COMPANY,
By T. M. [illegible]soll, Their Attorney.

IOWA PUBLIC SERVICE COMPANY,
By Byron L. Sifford, Its Attorney.

IOWA UTILITIES ASSOCIATION,
By Frederic M. Miller, Its Attorney.

Acknowledgment of Service.

The undersigned acknowledge receipt of copies of the foregoing this 10th day of October, 1955.

JAMES R. McMANUS,
XAVIER C. NADY,
Attorneys of record for Plaintiffs.

[fol. 111] In the United States District Court for the Southern District of Iowa, Davenport Division.

Affidavit of Service.

I, Robert H. Walker, one of the attorneys for Union Electric Power Company, depose and state that I served a copy of the foregoing motions by depositing a copy of the same in the United States mail to the last known address to the following persons, and at the following addresses:

F. A. E. Gillmor
Donahue, Iowa

Carl J. Mitzner
R. F. D.
Tipton, Iowa

P. H. Naber
Hershey Building
Muscatine, Iowa

Harry Imel
P.O. Box 486
Muscatine, Iowa

Harry J. Strong
1011 East High
Davenport, Iowa

First Iowa Hydro Electric Cooperative
Muscatine, Iowa

ROBERT H. WALKER,
Attorney for
Union Electric Power Company.

Subscribed and sworn to before me this 10th day of October, A. D., 1955.

(Notary Seal)

MICHAEL T. ORGAN,
Commissioner.

[fol. 112] (Order of Special Master amending Order on Motion of Plaintiffs to remove France, France & Nady, et al., as their Attorneys)

(Filed in U. S. District Court on October 11, 1955)

The order dated October 5, 1955, and made by the Special Master on the motion of plaintiffs for leave to remove their attorneys and on the resistance and application of said attorneys is hereby amended as follows:

Consistently with order for hearing and statements of the Special Master in the course of hearing, the following is added to said order:

Defendants took no part in the hearing which was ex parte as to them.

Dated October 10th, 1955.

EDWARD A. DOERR,
Special Master.

[fol. 113] (Motion of Plaintiffs to expunge from the Record the Order of the Special Master of October 5, 1955, on Motion of Plaintiffs to remove France, France & Nady, et al., as their Attorneys)

(Filed in U. S. District Court on October 17, 1955)

Now comes First Iowa Hydro Electric Cooperative, a corporation, Harry J. Strong, Harry Imel, Frank A. E. Gillmor, P. H. Naber and Carl J. Mitzner, individual plaintiffs in this action, the individual plaintiffs being all the members of the Board of Directors of First Iowa Hydro Electric Cooperative, the corporate plaintiff, and state unto the Court as follows:

1. That First Iowa Hydro Electric Cooperative is a corporation organized under, and existing by virtue of the laws of Iowa, and maintaining its principal office at Muscatine, Iowa.

2. That Frank A. E. Gillmor is President of the First Iowa Hydro Electric Cooperative and also a member of the Board of Directors of said Cooperative.

3. That Carl J. Mitzner is Vice President of the First Iowa Hydro Electric Cooperative and also a member of the Board of Directors of said Cooperative.

4. That Harry J. Strong is Secretary-Treasurer of said Cooperative and also a member of the Board of Directors of said Cooperative.

5. That Harry Imel is a member of the Board of Directors of said Cooperative.

[fol. 114] 6. That P. H. Naber is a member of the Board of Directors of said Cooperative.

7. That the hearing on October 3, 1955 was an ex parte hearing without proper notice ever being served on plaintiffs; that no plaintiff ever received a properly signed notice.

8. That on September 16, 1955, plaintiffs filed a Motion for leave to remove their attorneys; that the Court had notice plaintiffs were without attorneys.

9. That plaintiffs were not afforded adequate protection in the Order setting forth a hearing for October 3, 1955; that the Special Master was informed and knew that certain of the plaintiffs were in St. Paul, Minnesota before a Circuit Court of Appeals Judge at a time when said hearing was going on and that it was impossible for them to attend said hearing.

10 That said Order provides for fees in the sum of $200,000.00 which is not binding on defendants and which specifically could not have been proven up in the short period of the hearing; that proof of said fees is on an hourly basis using the customary and usual fees of the community in question, and the record does not support any proof of fees where two law firms come out with exactly the same hours and time consumed in said case.

11. That before the Court at the time of this hearing, was a resistance filed by the law firms of France, France & Nady and James R. McManus and Allan R. Shepherd, and also a Petition to Intervene by Seth Gooder, Joseph F. Condon and Lloyd Drexler; that an examination of the resistance and the Petition to Intervene shows that both documents were prepared in the light of one another; that the interests of the plaintiffs and the interests of Seth Gooder, Joseph F. Condon and Lloyd Drexler are opposed; that the petitioners to intervene acted with and testified for the attorneys of record for plaintiff.

[fol. 115] 12. That the Court has since dismissed the Petition to Intervene, but that the plaintiffs, on information and belief, understand the intervenors are now filing Involuntary Petition in Bankruptcy against the plaintiff corporation.

13. That it is quite apparent from the existing records referred to in this document that the accused attorneys and the intervenors are conspiring to appropriate this cause of action for themselves and in violation of the attorneys' duty toward their clients.

14. That plaintiffs' Motion for Leave to Remove Counsel filed with the Court on September 16, 1955 was a sworn Motion, wherein the plaintiff made affidavit as to the allegations; the resistance filed by the alleged counsel was not a sworn Motion.

15. That the hearing held on October 3rd contains no sworn testimony controverting the sworn pleadings of the plaintiffs, and the sworn pleadings of the plaintiffs must go as admitted; that the admission of the uncontroverted sworn pleadings of the plaintiffs is sufficient to deny the alleged attorneys any of the relief granted in the Order of October 5, 1955.

16. That said hearing was attended by defendants, whereas the Order is not binding on the defendant, yet attempts to bind the plaintiffs.

17. That said Order is in violation of the constitutional rights of the plaintiffs.

Wherefore, plaintiffs pray said Order be [exponged] from the record.

FIRST IOWA HYDRO ELECTRIC
COOPERATIVE,
By: Harry J. Strong,
Its Secretary-Treasurer.

F. A. E. Gillmor,
Carl J. Mitzner,
Harry J. Strong,
Harry Imel,
P. H. Naber.

[fol. 116] Resistance to Defendants' Motion to Dismiss and Application by Plaintiffs for Affirmative Relief.

(Filed in U. S. District Court on October 17, 1955)

Now comes First Iowa Hydro Electric Cooperative, a corporation, Harry J. Strong, Harry Imel, Frank A. E. Gillmor, P. H. Naber and Carl J. Mitzner, individual plaintiffs in this action, the individual plaintiffs being all the members of the Board of Directors of First Iowa Hydro Electric Cooperative, the corporate plaintiff, and state unto the Court as follows:

Division I.

1. That First Iowa Hydro Electric Cooperative is a corporation organized under, and existing by virtue of the laws of Iowa, and maintaining its principal office at Muscatine, Iowa.

2. That Frank A. E. Gillmor is President of the First Iowa Hydro Electric Cooperative and also a member of the Board of Directors of said Cooperative.

3. That Carl J. Mitzner is Vice President of the First Iowa Hydro Electric Cooperative and also a member of the Board of Directors of said Cooperative.

4. That Harry J. Strong is Secretary-Treasurer of said Cooperative and also a member of the Board of Directors of said Cooperative.

[fol. 117] 5. That Harry Imel is a member of the Board of Directors of said Cooperative.

6. That P. H. Naber is a member of the Board of Directors of said Cooperative.

7. That since September 2, 1955, plaintiffs in this action have been unrepresented by counsel in whom they had confidence; that the plight of plaintiffs since September 2, 1955 is more fully disclosed by a document known as "Petition for Writ of Mandamus and Injunction and Temporary Order Staying Proceedings in Civil No. 1-224" prepared for the United States Court of Appeals for the Eighth Circuit, St. Louis, Missouri, which is attached hereto and made a part of this Motion and hereinafter referred to as Exhibit (1) of this Motion.

8. That Exhibit D and Exhibit H of Exhibit (1) are proof that the Court knew of the plaintiffs' plight since September 2, 1955.

9. That Exhibit P of Exhibit (1) is an Order calling for hearings to resume on October 10, 1955 and is an Order dated September 28, 1955; that said Order, Exhibit P of Exhibit (1) was an Order issued when Exhibit D and Exhibit H of Exhibit (1) were still undisposed of by the Court.

10. That because Exhibit D and Exhibit H of Exhibit (1) had not been disposed of by the Court, no proper notice was ever issued setting a time for taking of deposition, nor could such a notice be properly served on the plaintiffs until the Court had disposed of Exhibit D and Exhibit H of Exhibit (1).

11. That plaintiffs have filed a Motion to [Exponge] the Order of October 5, 1955, and plaintiffs' Motion to [Exponge] the Order of October 5, 1955 has not been acted upon.

12. That plaintiffs never received a properly signed notice of any hearing.

[fol. 118] 13. That the Court was informed that plaintiff, Harry J. Strong, was unrepresented on October 10, 1955 and had been informed well prior to said hearing.

14. That plaintiffs have filed a Motion to [Exponge] the deposition of Harry J. Strong, which motion the Court has not as yet disposed of and which should be disposed of before the Court is in a position to consider a Motion to Dismiss on failure to testify.

15. That the acts of Harry J. Strong have not been willful acts as will be more clearly seen by reading Exhibit (1) which Exhibit requests that the Court stop the delaying tactics of defendants and set this case for a trial certain thirty (30) days after date when plaintiffs are allowed to retain counsel in whom they have confidence.

16. That the hearing of October 10, 1955 at 11:00 o'clock A. M., was at a time one hour and twenty-five minutes after plaintiff, Harry J. Strong, had filed an Affidavit of Bias and Prejudice; and that with the filing of the Affidavit of Bias and Prejudice, the Court was estopped from any action until the Court had complied with Court rules of Affidavits of Bias and Prejudice.

17. That the Court did not comply with any Court rules on an Affidavit of Bias and Prejudice prior to 11:00 o'clock A. M. on October 10, 1955; that without complying with any such rules the Court was not in a position to hold a hearing on October 10, 1955 at 11:00 o'clock.

18. That the Court has had numerous documents before it which clearly unfold the conspiracy between certain individuals who attempted to intervene in this action; and the plaintiffs and the Court well knew that the plaintiffs and the potential intervenors had adverse interests, and the Court well knew that the so called attorneys of record were working with the intervenors and against the interests

of plaintiffs, and the Court had a duty to protect plaintiffs [fol. 119] against the adverse interests of the so-called attorneys of record; that the Court failed in its duty toward plaintiffs, and failed more particularly in attempting to set a hearing for a day certain at a time when plaintiffs were unrepresented and before it could be determined whether new attorneys would have sufficient time to prepare themselves.

19. That Harry J. Strong is but one of six plaintiffs in this action; and although plaintiffs deny there was ever any wrongful act of Harry J. Strong, the acts of one plaintiff cannot control as to the other five plaintiffs, and the other five plaintiffs cannot be bound by the acts of one plaintiff in an action of this type.

20. That plaintiffs requested of the Master well before the hearing, and with sufficient time for the Master to inform all parties of any postponement; that a postponement would be necessary for the question of representation of the plaintiffs had to be finally determined before the plaintiffs could again testify.

21. That plaintiff, Harry J. Strong, called the Master by telephone on October 5, 1955 and so informed the Master of these facts.

22. That the attempt of a hearing on October 10, 1955, was an attempt to foreclose the plaintiffs from questioning an Order of October 5, 1955 on a question of attorneys, which Order was contrary to all laws and facts of such cases.

24. That the Master well knew that his hearing on the question of attorneys on October 3, 1955 was in error, for the plaintiffs in this action filed a Motion on September 16, 1955 to remove their attorneys, which Motion was a sworn pleading; that the resistance filed by the alleged attorneys of record was not a sworn pleading, and the Master should not have heard any testimony until a sworn resistance was filed in the Court, because the Motion and the resistance were directly contrary, and the Court should [fol. 120] have insisted upon sworn pleadings to maintain

the dignity of the Court and properly prosecute for perjury any perjurious statements.

25. That the Master failed in his duty toward these plaintiffs in not so insisting upon sworn pleadings in reply to a sworn Motion.

Wherefore, plaintiffs pray that Division I of defendants' Motion to Dismiss be [exponged] from the record.

Division II

Plaintiffs reaffirm and reallege paragraphs 1 through 8 of Division I as paragraphs 1 through 8 of Division II.

9. That Court Order of September 21, 1955 was a Court Order when plaintiffs had before the Court Exhibit D and Exhibit H of Exhibit (1).

10. That the Court had knowledge that plaintiffs were unrepresented when the Order of September 21, 1955 was issued, and the Court had failed to dispose of the matter contained in Exhibit D and Exhibit H of Exhibit (1) when the Court issued the Order of September 21, 1955.

11. That the Order of September 21, 1955 was an Order which contained more than one Order and is more particularly an Order ordering a Special Master and may be found as Exhibit L of Exhibit (1).

12. That said Order appointed a new Master to pass upon findings of fact and conclusions of law and called for the payment of certain moneys and allowed a Special Master to pay out certain sums; that said Order was in derogation of plaintiffs' rights in that there was no provision for examination into the qualifications of the Special Master; in that it granted to a Special Master certain determinations which are reserved for a jury, and the plaintiffs, in this action, have requested a jury action.

13. That it is the understanding of the plaintiffs that the original Order of the Court, before it was modified by a Mr. Bergstrom in an ex parte matter, called for the [fol. 121] defendants to pay the costs of deposition; and that it is the understanding of the plaintiffs that all parties

have a right to question the unreasonableness of any fees disbursed, and no such provision could be found in the Order of September 21, 1955.

14. That plaintiffs, being unrepresented as may be found by the Court's own record, were entitled to a hearing on this matter.

15. That plaintiffs filed a Motion to Defer the Deposit of Funds in Davenport, Iowa on September 26, 1955; that on September 26, 1955, Judge William F. Riley was not in Davenport, Iowa, but was in fact, in Des Moines, Iowa; that on the 27th day of September, 1955, without the benefit of a hearing, and with full knowledge that plaintiffs had filed Exhibit D and Exhibit H of Exhibit (1) with the Court, and that Exhibit D and Exhibit H of Exhibit (1) were undisposed of by the Court, Judge William F. Riley, in Des Moines, Iowa, issued an Order which is referred to in Division II of defendants' Motion to Dismiss.

16. That plaintiffs' Motion to Defer Deposit was filed at 2:40 o'clock P.M. on September 26, 1955; that it was quite apparent that the Court, in this action, was acting to forestall any exception being taken to the Orders even though they may be in derogation of the plaintiffs' rights.

17. That plaintiffs are a non-profit cooperative organized under the laws of the State of Iowa, and can only act in matters such as a deposit of $2,500.00 by an act of the Board of Directors of said cooperative; that plaintiffs had attempted to get counsel to examine the Order and advise them whether they should act upon the Order; that all attorneys contacted refused to pass upon the subject unless they could review the whole file in said case; that the Orders of this Court have been such where no attorney is allowed to examine the file unless he becomes an attorney of record; that consequently, plaintiffs were advised that no one would be able to advise them on this matter until the Court first finally determined the [fol. 122] question of plaintiffs' counsel; that as of today, plaintiffs are not in position to be fully advised on their rights in this matter.

18. That the Court has seen fit to freeze plaintiffs from obtaining legal advice from attorneys in whom they have confidence, and has seen fit to freeze counsel, i.e, plaintiffs with attorneys that the Court records of the Southern District of Iowa will well indicate are working "hand in glove" with certain individuals who are attempting to appropriate for their own use, plaintiffs' cause of action; and which acts indicate clearly that said attorneys have interests in conflict with the plaintiffs.

19. That Division II of defendants' Motion to Dismiss is in error in that it states that plaintiffs have ample funds, whereas the true facts are that said funds are being held in a trust capacity and allowed to be used only when fully advised as to their use by competent counsel; that until such time as the Court allows plaintiffs to retain competent counsel in whom they have confidence, plaintiffs are not in a position to deposit any funds or they would be violating their trust obligations toward the contributors.

Wherefore, plaintiffs pray that Division II of defendants' Motion to Dismiss be quashed.

Division III

Plaintiffs reaffirm and reallege each and every paragraph to be found in Division I and Division II as their resistance to Division III of defendants' Motion to Dismiss.

Wherefore, plaintiffs pray that Division III of defendants' Motion to Dismiss be quashed.

Plaintiffs' Application for Affirmative Relief

Now comes First Iowa Hydro Electric Cooperative, a corporation, Harry J. Strong, Harry Imel, Frank A. E. Gillmor, P. H. Naber and Carl J. Mitzner, individual plaintiffs in this action, the individual plaintiffs being all the members of the Board of Directors of First Iowa Hydro Electric Cooperative, the corporate plaintiff, and state unto the Court as follows:

[fol. 123] 1. That First Iowa Hydro Electric Cooperative is a corporation organized under, and existing by

virture of the laws of Iowa, and maintaining its principal office at Muscatine, Iowa.

2. That Frank A. E. Gillmor is President of the First Iowa Hydro Electric Cooperative and also a member of the Board of Directors of said cooperative.

3. That Carl J. Mitzner is Vice President of the First Iowa Hydro Electric Cooperative and also a member of the Board of Directors of said Cooperative.

4. That Harry J. Strong is Secretary-Treasurer of said Cooperative and also a member of the Board of Directors of said Cooperative.

That Harry Imel is a member of the Board of Directors of said Cooperative.

6. That P. H. Naber is a member of the Board of Directors of said Cooperative.

7. That since September 2, 1955, plaintiffs in this action have been unrepresented by counsel in whom they had confidence; that the plight of plaintiffs since September 2, 1955 is more fully disclosed by a document known as "Petition for Writ of Mandamus and Injunction and Temporary Order Staying Proceedings in Civil No. 1-224" prepared for the United States Court of Appeals for the Eighth Circuit, St. Louis, Missouri, which is attached hereto and made a part of this Motion and hereinafter referred to as Exhibit (1) of this Motion.

8. That Exhibit D and Exhibit H of Exhibit (1) are proof that the Court knew of the plaintiffs' plight since September 2, 1955.

9. That in Exhibit (1) on page 14 of same, plaintiffs prayed for the Court of Appeals to direct that the United States District Court of the Southern District of Iowa, Davenport Division be directed and commanded to [expunge] from the record all Orders issued since September [fol. 124] 2, 1955, and commanding that it set Civil action No. 1-224 for a trial within thirty days from the date of said Order; that plaintiffs still pray of this Court that this act be done:

10. That since the filing of Exhibit (1) with the Circuit Court of Appeals, the Court, on October 3, 1955 held a hearing wherein the petitioners to intervene, more particularly to be found in Exhibit U of Exhibit (1), and the alleged attorneys of record for plaintiffs worked hand in hand in support of one another where the petitioners to intervene and plaintiffs had a direct conflict of interest.

11. That because the alleged attorneys of record have worked with people and for people who have a direct conflict of interest and individuals that are now attempting to bankrupt the plaintiffs so they may appropriate this cause of action for their own use, plaintiffs' rights will be in jeopardy unless this Court sees fit to discharge the alleged attorneys of record.

13. That the plaintiffs of record have filed a Motion [expunge] a certain document called "Deposition of Harry J. Strong".

14. That on March 12, 1954, defendants in this action filed interrogatories, said interrogatories being attached hereto and made a part hereof and hereinafter referred to as Exhibit (2) of this pleading.

15. That on the 13th day of April, 1954, plaintiffs in this action filed their answers to said interrogatories; said answers being attached hereto and made a part hereof and hereinafter referred to as Exhibit (3).

16. That on the 9th day of July, 1954, the Court entered an Order requesting that the defendants plead to the plaintiffs' Complaint; said Order being attached hereto and made a part hereof and hereinafter referred to as Exhibit (4).

[fol. 125] 17. That this case is now at issue. That a certain document called "Deposition of Harry J. Strong", now contains 1957 pages and that said document is merely a [repitition] of plaintiffs' answers to the interrogatories, Exhibit (3).

18. That a certain document, "Deposition of Harry J. Strong", contains statements which indicate there are

unreported remarks, and therefore said document is not a true and correct copy of all proceedings.

19. That plaintiffs have been attempting to have this action tried since the issues were joined, and defendants are merely pulling stalling tactics in the hope they can break this non-profit cooperative.

20. That the original rules for discovery depositions were to allow people such as the plaintiffs, to find the full facts on such conspiracies such as the defendants have conspired against the plaintiffs in this action; that all facts of conspiracy, if there be one, are facts which have been known to the defendants from the day they first conspired; that the discovery deposition is not being used to discover anything except for the defendants to find out plaintiffs' contemplated procedure for proof of facts already known to the defendants.

21. That the discovery deposition of 1957 pages is on one witness alone, and the defendants have indicated they intend to continue on this same witness for at least another 1000 pages and then proceed with numerous other witnesses; that unless the Court steps in at this time and forces this case to trial, the plaintiffs will be denied their right to a fair and impartial trial.

22. That the cost in this suit has been prohibitively high because of the stalling tactics of the defendants in their modes of procedure.

23. That the defendants are corporations of unlimited funds and protected as a public utility with rates which guarantee a return regardless of expenditures.

24. That plaintiffs, being a non-profit cooperative formed under the laws of the State of Iowa, are, by the laws of the State of Iowa, men of farm background, and incorporated not for personal gain; being a non-profit cooperative, but as a public service to the State of Iowa.

25. That the plaintiffs have been harrassed in this action since 1938; have been compelled to go to the Supreme Court twice in gaining a Federal license and now have a

Federal license but because of conspiracy of defendants, they have been unable to build a project licensed by the Federal Government.

26. That the plaintiffs had exhaustive hearings on the feasibility of the project before the Federal Government, and the Federal Government granted a license after examining all facts on the feasibility of the project; that the question of feasibility of the project was determined by the Federal Power Commission, appealed up through the Courts of the United States up to the Supreme Court of the United States, and today defendants are attempting, through their depositions, questions and interrogatories, to again reopen a subject of the feasibility of this project, at great cost to the plaintiffs; and the defendants are, in reality, attempting to make this District Court an Appeal Court from the Supreme Court of the United States.

27. That unless the Court examines the complete file in this case and allows the plaintiffs a remedy as requested in Exhibit (1), plaintiffs will be denied the right to a fair and impartial trial for the plaintiffs readily admit unto the Court they cannot match funds dollar for dollar, with these wealthy defendants; that if, after examining Exhibit (2) and Exhibit (3) and the 1957 pages of a document called "Deposition of Harry J. Strong", defendants do not have sufficient knowledge to defend this action, it is quite apparent they will never have sufficient knowledge, and that it is also quite apparent they are not after sufficient knowledge, but merely using such tactics as their [fol. 127] strategy in keeping this matter away from a jury which was requested by plaintiffs.

28. That the actions of defendants in this action have become most vicious in that we are advised that a manager of a local branch of one of the defendants contacted one of the principal backers of this project to find out if that principal backer of this project could accept a subpoena for involuntary petition in bankruptcy filed by alleged intervenors, intervenors denied the right to intervene by this Court, in an action in bankruptcy filed in Council Bluffs, Iowa; that this contact between the defendants, and emanating from intervenors and conspired by the al-

leged attorneys of record for the plaintiffs, was made before any Court records of said bankruptcy were in the Court in Davenport, Iowa or any subpoena served in this action.

29. That unless the Court forces this case to trial, the conspiracy which was alleged in this Complaint apparently is continuing, and will continue until such time as plaintiffs are broken and unable to further pursue the action.

30. That on many occasions since the start of this action, defendants, or agents of defendants, have contacted witnesses of plaintiffs; that the Court, in allowing the stalling tactics of the defendants, is merely granting more time to the defendants to contact and to work on and to scheme against the witnesses for plaintiffs.

31. That plaintiffs have contacted good counsel, and if the Court would allow these counsel to appear of record, said counsel say they would be prepared to try said case within thirty days from their entrance of appearance.

32. That plaintiffs would like to take depositions on the defendants, but plaintiffs will forego this if the Court can see fit to actually try the case.

33. That in instances since the filing of this case, certain witnesses have been tampered with as will be found [fol. 128] in the document, "Deposition of Harry J. Strong".

34. That if this case is set for trial with the thirty day preparation by attorneys in whom plaintiffs have confidence, plaintiffs will pay into the registry of the Court their portion of the costs which may have accrued to date, if advised to do so by attorneys in whom they have confidence.

35. Plaintiffs have made this pleading exceedingly long because plaintiffs feel the Court should, at one time, examine all the records in this matter before making a decision one way or the other and more particularly, the plaintiffs feel each and every Order of the Court issued since September 2, 1955 should be closely examined and

that all document filed herein should be examined in the light of this pleading.

Wherefore, plaintiffs pray that all Orders issued since September 2, 1955 in this matter, be [exponged] from the record;

That the alleged attorneys of record be discharged because of their conspiracy against their clients;

That the plaintiffs be allowed to engage counsel in whom they have confidence;

That an Order issue from this Court so ordering that all Orders issued since September 2, 1955 be [exponged] from the record and that said Order further set forth that plaintiffs have the right to hire counsel in whom they have confidence and that said Order further state that trial be set for a day certain thirty days from the date of said Order.

FIRST IOWA HYDRO ELECTRIC COOPERATIVE

By Harry J. Strong
Its Secretary-Treasurer

F. A. E. Gillmor
Carl J. Mitzner
Harry J. Strong
Harry Imel
P. H. Naber

[fol. 129] State of
County of ss.

F. A. E. Gillmor, Carl J. Mitzner, Harry J. Strong, Harry Imel, and P. H. Naber, being first duly sworn, on oath, depose and say that they have read the foregoing petition by them subscribed and that the matters and things contained therein are true to the best of their knowledge and belief.

F. A. E. Gillmor
Carl J. Mitzner
Harry J. Strong
Harry Imel
P. H. Naber

Subscribed and sworn to before me this —— day of October, A. D. 1955.

Glenn A. Elston
Notary Public

[fol.130] (Order of District Court of Affidavit of Prejudice)

(Filed in U. S. District Court on October 21, 1955)

By its order of October 14, 1955, the court directed that the affidavit of prejudice directed against the judge of this court and filed by the plaintiff Harry J. Strong, on his own behalf and purportedly as a representative of all other individual plaintiffs and as an officer of the First Iowa Hydro Electric Cooperative, should come on to be heard today at 2:00 o'clock p. m., as to its timeliness and sufficiency.

Notice of this hearing was given by mailing a copy of the order to each of the plaintiffs and to their counsel of record, James D. France, X. C. Nady, J. R. McManus, and Allan R. Shepherd. Such notice has been duly given.

The affidavit charges that it is the belief of the affiant that the judge "has a personal bias and prejudice against our project, a hydro electric development on the Cedar River." The rest of the affidavit is devoted to a statement of the reasons for such belief.

Section 144 of Title 28 of U.S.C.A. permits the filing of an affidavit of bias or prejudice when the judge before whom the matter is pending has a personal bias or prejudice either against the parties plaintiff, or any of them, or in favor of adverse parties.

The authorities appear definitely to establish that my [fol. 131] power is limited to inquiring into the timeliness and sufficiency of the affidavit.

Accordingly, the affidavit has been so examined.

This action was filed February 18, 1954; the affidavit October 10, 1955. The court must find that it is not timely.

As to its sufficiency, the affidavit fails to meet the requirements of Section 144 of Title 28 as to the personal bias or prejudice, since that here charged is "against our project."

The affidavit is not sufficient for the added reason that it is not accompanied by a certificate of counsel of record stating that it is made in good faith. The affidavit of Harry J. Strong, attached, is not such a certificate.

It Is Therefore Ordered And Adjudged that the affidavit of bias and prejudice is neither timely nor sufficient and for other reasons fails to meet the requirements of Section 144 of Title 28 U.S.C.A.

It Is Therefore Further Ordered that proceedings in this cause shall be continued as though such affidavit had not been filed.

An exception is granted to those who deem themselves adversely affected by this ruling.

Signed at Des Moines, Iowa, this 21st day of October, 1955.

WM. F. RILEY,
United States District Judge.

[fol. 132] (Order of Special Master striking certain Papers filed by Plaintiffs from Files, etc.)

(Filed in U. S. District Court on October 28, 1955.)

This order is made on my own initiative.

In accordance with my order of October 24th, 1955, a hearing was held by me on October 28th, 1955, at 10:30 o'clock A. M., on the question whether an order substantially in the form of the present order should be entered. J. R. McManus, James D. France and X. C. Nady, attorneys of record for plaintiffs, appeared for plaintiffs. Plaintiffs, although themselves notified of said hearing, failed to appear in any other manner. The said attorneys of record for plaintiffs stated in substance that the papers filed by plaintiffs in this action and which are hereinafter spe-

cifically designated were made and filed wholly without consultation by plaintiffs with their said attorneys and wholly without the knowledge of said attorneys and that said attorneys remained wholly without instruction from the plaintiffs with reference to any proceedings to be taken in this action upon said papers. After making certain objections to my authority as special master (which were overruled), said attorneys stated they had nothing more to submit.

Certain attorneys for one of the defendants were present by my leave solely as observers and took no part in the hearing.

[fol. 133] Plaintiffs have filed in this action papers entitled as follows:—

Motion To [Exponge] A Document Called Deposition Of Harry J. Strong

Motion To [Exponge] From the Record Order Dated October 5, 1955, Said Order Pertaining To A Hearing On October 3, 1955.

Motion To [Exponge] From The Record An Order Dated October 11, 1955 And Order Pertaining To Motions To Dismiss And Hearing On Affidavit Of Prejudice.

Motion To [Exponge] An Order Of Judge William F. Riley Dated October 14, 1955 In Reference To Affidavit Of Prejudice.

Resistance To Defendants' Motion To Dismiss And Application For Affirmative Relief

Plaintiff Harry Imel has filed in this action a paper entitled as follows:—

Motion In Resistance To The Substitution Of Any Party Plaintiff

None of the papers referred to are signed by any attorney of record for plaintiffs as required by Rule 11 and Rule 7 (b) (2) of the Federal Rules of Civil Procedure. Plaintiffs claim to be unrepresented by any attorney. In

fact, their attorneys of record continue to represent plaintiffs actively, as established by the record.

The following further immediately relevant matters are established by the record, to wit:—

Plaintiffs filed in this matter a motion for leave to remove their attorneys, which has been treated as a motion for substitution of counsel; that motion was heard on October 3rd, 1955, pursuant to my prior order; such prior order granted leave to plaintiffs to be represented at the hearing of their motion by counsel of their own choosing; plaintiffs [fol. 134] although notified of the hearing, failed to appear in person or by counsel of their choosing; they also failed to apply for any postponement of the hearing; nevertheless by my order of October 5th, 1955, their motion was granted, although upon condition that they compensate their attorneys of record for services rendered; in spite of plaintiffs' failure to appear, my said order granted them leave to show a lack of means to perform the condition and to apply for a corresponding reduction in the amount to be paid by them to their attorneys; plaintiffs have failed to make any such application.

The following further immediately relevant matters are established by the record, to wit:—

On September 27th, 1955, the court entered in this matter its Order Denying Motion To Defer Requirement Of Deposit; that order directed plaintiffs, in conformity with a prior order of the court of date September 21st, 1955, to pay into the registry of the court the sum of $2500.00 as a condition to going forward with the action; said sum was not deposited by plaintiffs prior to their filing of the papers hereinbefore referred to and has not yet been so deposited.

It further appears of record that plaintiff First Iowa Hydro Electric Cooperative is a corporation wholly unrepresented by any attorney in connection with the filing of the papers hereinbefore referred to but purportedly represented therein solely by its lay officer, Harry J. Strong.

I state the following conclusions:—

The claim of plaintiffs that they are not represented by any attorney is frivolous.

The individual plaintiffs having been represented herein by their attorneys of record are not privileged also to proceed in this action without attorneys or as attorneys pro se, unless they shall first comply with my order of October [fol. 135] 5th, 1955, on their motion for leave to remove their attorneys.

The corporate plaintiff, First Iowa Hydro Electric Cooperative, can in no event proceed in this action in any manner except by an attorney, the corporation being incapable of acting as attorney pro se and its lay officer being incapable of acting as attorney for it.

The filing by plaintiffs of the papers referred to, if permitted to stand, would have the effect to nullify the court's order of September 27th, 1955, and my order of October 5th, 1955.

The filing by plaintiffs of the papers referred to, if permitted to stand, and the taking or entertaining by me of any proceedings based thereon, other than to strike the same from the files, would have the effect to encourage disorderly judicial procedure and the defiance of judicial orders.

It is ordered:

(1) The papers filed by plaintiffs and designated as above recited are stricken from the files and shall be physically removed from the files by the Clerk. The prior, formal filing of the papers shall be of no effect except as the papers constitute examples of breach of the applicable rules of procedure and of subsisting orders in this action.

(2) No pleading or motion which may be tendered by plaintiffs for filing and which shall not be signed by an attorney of record for plaintiffs in accordance with the above cited rules shall be filed or received by the Clerk, except as may be specifically provided by my later order or by order of the court.

(3) No pleading, motion or paper tendered by plaintiffs for filing shall be filed or received by the Clerk nor shall the plaintiffs be permitted in any other manner to go forward with the action unless plaintiffs shall first have paid

into the registry of the court the sum of $2500.00 in con-
[fol. 136] formity with the court's orders of September 21st, 1955, and September 27th, 1955. The plaintiffs are not by this section (3) precluded from acting in opposition or resistance to any action taken by defendants, provided that such action by plaintiffs shall be taken in conformity with this order generally.

(4) No pleading or motion which may be filed in this matter by defendants or any of them is required to be served on plaintiffs or any of them, except by means of service upon an attorney of record for plaintiffs in accordance with Rule 5 (b) of the Federal Rules of Civil Procedure and except as may be otherwise ordered by me or the court in accordance with said rule; provided that service upon plaintiffs themselves is not hereby prohibited.

5. No order which may hereafter be made in this matter shall be served by the Clerk on plaintiffs or any of them, except by means of service upon an attorney of record for plaintiffs in accordance with said Rule 5 (b) and except as may be otherwise ordered by me or the court in accordance with said rule; provided that defendants are not hereby prohibited from serving any order on plaintiffs themselves.

(6) This order shall be served by the Clerk by mail upon defendants by serving their attorneys and upon plaintiffs by serving their attorneys of record and plaintiff themselves.

Dated October 28th, 1955.

EDWARD A. DOERR,
Special Master.

[fol. 137] (Order of District Court for Payment of Fees to Special Master, Wayne G. Cook.)

(Filed in U. S. District Court on November 9, 1955.)

In accordance with the previous order of this Court dated October 24, 1955, allowing the statement of fees and

disbursements of Wayne G. Cook as Special Master, subject to the right of the Defendants to show cause on or before November 4, 1955, why such an allowance should not be paid, and it now appearing to the Court that the date for any of the participating Defendants to show cause in the premises has passed, and there being no objection filed, it is therefore—

Ordered that payment in the total amount of $3,043.38 covering the statement for fees and expenses of Wayne G. Cook while acting as Special Master, be paid by the Defendant Union Electric Power Company with the right of contribution from other participating Defendants, and that upon payment, an acknowledgement of such payment shall be made by the said Wayne G. Cook by endorsement on a copy of this order and thereafter filed in this cause.

WM. F. RILEY,
United States District Court Judge.

Payment of the amount provided in the foregoing Order of $3,043.38 is acknowledged this 10 day of November A. D.

WAYNE G. COOK.

[fol. 138] (Order of Special Master on Motion of Defendants to Dismiss)

(Filed in U. S. District Court on November 21, 1955)

This order is made on the Motions To Dismiss filed in this matter by defendants. The motions were heard, argued and submitted on the 18th day of November, 1955. Plaintiffs appeared by their attorneys of record, James R. McManus and James D. France. The plaintiff Harry J. Strong was present in person at the beginning of the hearing but left before argument. Defendant Union Electric Company appeared by Robert H. Walker, its attorney. Certain of the other defendants appeared by counsel and all of the defendants joined in a brief and argument filed with

me. This order will relate the important record facts, will make fact findings and will state conclusions. That procedure should make it more convenient for any party who may want a review to obtain one.

Harry J. Strong is one of the plaintiffs. He is an officer and the managing agent of another plaintiff, First Iowa Hydro Electric Cooperative.

The taking of the testimony of Harry J. Strong on deposition, at the defendants' instance, was begun long prior to October 10th, 1955, was continued over an extended period with a number of interruptions and, on the last mentioned [fol. 139] date, was due to be resumed pursuant to my order. At the time and place fixed for resumption of his testimony, Mr. Strong appeared and immediately announced his refusal to testify. He left the hearing room before there was any opportunity to question him. A full record of the incident was made by the court reporter who was in attendance.

In connection with his refusal to testify, Mr. Strong asserted that he was unrepresented by counsel and that there had been filed in the court an affidavit of prejudice.

The record facts on Mr. Strong's claim that he had no counsel are these:—Plaintiffs filed in this matter a motion for leave to remove their local attorneys of record, which has been treated as a motion for substitution of counsel; that motion was heard on October 3rd, 1955, pursuant to my prior order; such prior order granted leave to plaintiffs to be represented at the hearing of their motion by counsel of their own choosing; plaintiffs, although notified of the hearing, failed to appear in person or by counsel of their choosing; they also failed to apply for any postponement of the hearing; nevertheless by my order of October 5th, 1955 their motion was granted, although upon condition that they compensate their local attorneys of record for services rendered; in spite of plaintiffs' failure to appear, my order granted them leave to show a lack of means to perform the condition and further leave to apply for a corresponding reduction in the amount to be paid by them to their local attorneys; plaintiffs have failed to make any such application; in fact, plaintiffs' local counsel

of record have continued at all times in the active representation of plaintiffs; further, plaintiffs have never moved to discharge their counsel of record who reside outside of the district.

I find that the services of such nonresident counsel, as well as local counsel, have been available to Mr. Strong (and to the plaintiffs generally) at all times.

The record facts on Mr. Strong's reference to an affidavit [fol. 140] of prejudice are these:—The affidavit of prejudice was filed by Mr. Strong on October 10th, 1955, less than two hours before the scheduled resumption of his testimony on deposition; it asserted prejudice on the part of Judge William F. Riley, presiding in this court and action; the affidavit was wholly insufficient in substance; it was not timely filed; no affidavit of counsel was attached as required by statute; it was in effect stricken from the files by order of the court on October 21, 1955.

Division I and Division III, paragraph 1, of the motions to dismiss are based on Mr. Strong's refusal to testify (considered, in the first case, under Rule 37 (d), as a failure to appear for deposition in response to notice, and, in the second case, under Rule 41 (b), as a violation of the court's order to appear for deposition).

The motions also charge against all of the plaintiffs their failure to comply with the court's orders. The orders referred to, dated September 21st and September 27th, 1955, required the plaintiffs, as well as the defendants, to pay into the registry of the court the sum of $2500 as a fund from which the costs of reference might be paid. The defendants have made the required payment. The plaintiffs have wholly failed to do so, although payment was required to be made forthwith by the initial order. The second order was entered in consequence of a motion to defer the deposit, made by plaintiff Harry J. Strong on his own behalf and purportedly as a representative of all other plaintiffs. The grounds of the motion to defer were that plaintiffs were without counsel. (The record facts and my findings on this assertion have been stated.) The motion to defer did not assert any inability to make the required deposit and

the plaintiffs have never in any other way asserted their inability. The second order confirmed the initial one and required the deposit to be made by plaintiffs as a condition to the going forward with their action.

[fol. 141] Division II and Division III, paragraph 2, of the motions to dismiss are based on plaintiffs' failure to make the $2500 payment so required. The basis in law is, in the one case, the court's inherent power to regulate its own procedure by dismissal for disobedience of its order, and, in the second case, a like power under Rule 21 (b).

In addition to the specific grounds of the motions to dismiss, the record discloses numerous other instances of disorderly and irregular procedure taken by the plaintiffs personally, that is (so far as the record shows) independently of counsel.

I regard the refusal of the plaintiff Harry J. Strong to testify in the incident which has been recited as a failure on his part to appear for deposition in response to notice. I also regard such refusal as a failure to comply with my order and with orders made directly by the court for the resumption of Mr. Strong's deposition. I find that such refusal to testify was flagrant, wilful and without justification or excuse. I find that such refusal has had the necessary effect of disrupting orderly procedure in this action and of hampering defendants in making their defense.

Considering my finding of the character and effect of the violations, I conclude that the only appropriate sanction is dismissal and the only appropriate kind of dismissal is a dismissal operating as an adjudication upon the merits.

The penalty is the most extreme which can be imposed. So far as can be judged from the amount claimed, this suit is an important one. It is also important from the viewpoint that it seeks to vindicate a private right allegedly arising under the anti-trust laws which also announce and enforce a public policy. It is possible that Mr. Strong has relied on advice from an unknown source. For these reasons (coupled with the view that in case of doubt any suggestion of the arbitrary should be avoided) I conclude that

a dismissal should be ordered to be effective only after [fol. 142] extending a last chance to Mr. Strong to resume his deposition.

An order of dismissal on account of Mr. Strong's refusal to testify can of course operate only against him and the plaintiff First Iowa Hydro Electric Cooperative, of which he is an officer and managing agent.

The degree of solicitude shown for plaintiffs Harry J. Strong and First Iowa Hydro Electric Cooperative by this order should not be considered by any party as establishing a precedent.

Bankruptcy proceedings are pending against First Iowa Hydro Electric Cooperative. A receiver has been appointed in those proceedings. The order for dismissal should provide an opportunity to consider the position of the receiver (or of a trustee in bankruptcy) in the event that he comes into the action.

I turn to those parts of the motions which ask dismissal because of plaintiffs' failure to make the required $2500 deposit. I find that the failure by plaintiffs to comply with the order for such deposit is flagrant, wilful and without justification or excuse. I find that the effect of such failure has not been to disrupt orderly procedure in this action in any material degree and has not been to hamper defendants in making their defense. The court's order of September 27th, 1955, provided a sanction for plaintiffs' failure to comply with that same order by preventing them during the period of such failure, from going forward with their action. That sanction was made more specific in operation by my order of October 28th, 1955. Defendants have suffered only by making a contribution which plaintiffs have not matched as required. I do not make light of the inequality. I conclude, however, that the existing sanction is an adequate compensating advantage. Under that sanction, plaintiffs can not proceed against defendants until plaintiffs come into compliance; the defendants however can proceed freely to prepare their defense.

I conclude that the action should not be dismissed for [fol. 143] failure of plaintiffs to make the required $2500 deposit. The failure to make the required deposit may,

however, have a different aspect in future circumstances. The denial of the motion, so far as based on the grounds now considered, should therefore be without prejudice to renewal at a later date.

It is ordered:—

1. The taking of the deposition of the plaintiff Harry J. Strong pursuant to Rules 28 and 30 of the Federal Rules of Civil Procedure and prior orders in this matter, which proceeding was interrupted by the refusal of the said Harry J. Strong to testify on October 10th, 1955, will be resumed on December 6th, 1955, at 11:00 o'clock A. M. at 725 Davenport Bank Building, Davenport, Iowa.

2. The plaintiff Harry J. Strong is ordered to appear at the time and place stated in paragraph 1 and then and thereafter in the regular course of procedure to submit to the taking of his deposition.

3. In the event that the said Harry J. Strong shall fail to comply with the foregoing order, then Division I and Division III, paragraph 1, of the Motions To Dismiss of defendants will be granted as against plaintiffs Harry J. Strong and First Iowa Hydro Electric Cooperative and an order of dismissal supplementary to this order will thereupon be made without any further notice or hearing; provided that the foregoing shall be without prejudice to the consideration of any application which, prior to the making of such supplementary order, may be filed in this matter by a receiver or trustee in bankruptcy of plaintiff First Iowa Hydro Electric Cooperative.

4. Division II and Division III, paragraph 2, of the Motions To Dismiss of defendants are denied without prejudice to the renewal thereof at any time.

This order will be served by the clerk by mail, in the case of defendants by serving their attorneys of record,

and in the case of plaintiffs by serving their attorneys of [fol. 144] record and the plaintiffs themselves.

Dated November 21st, 1955.

EDWARD A. DOERR,
Special Master.

[fol. 145] (Order of Special Master amending Order of November 29, 1955, with reference to the Resumption of taking of Deposition of Plaintiff, Harry J. Strong, etc.)

(Filed in U. S. District Court on December 2, 1955)

This order is made pursuant to Rule 60 (a) upon my own initiative, although in compliance with the informal suggestion of plaintiffs' attorneys.

The order made by me of date November 29th, 1955, with reference to the resumption of the taking of deposition of the plaintiff Harry J. Strong is amended by adding thereto the following which was omitted from the order by reason of oversight, to-wit:—

In making the application for delay herein referred to plaintiffs, by their attorneys of record, have expressly reserved the objections to the order of reference herein which are asserted upon constitutional grounds and which have been stated at the several hearings in which plaintiffs have taken part following the appointment of the present special master.

Dated December 1, 1955.

EDWARD A. DOERR,
Special Master.

[fol. 146] (Order of Special Master dismissing Cause as to Plaintiffs, Harry J. Strong and First Iowa Hydro Electric Cooperative.)

(Filed in U.S. District Court on December 22, 1955.)

In The United States District Court
For The Southern District Of Iowa
Davenport Division

First Iowa Hydro Electric Cooperative, et al.,
Plaintiffs,
No. 1-224 vs. Civil Action.
Iowa-Illinois Gas And Electric Company, et al.,
Defendants.

My order dated November 21, 1955, made on the Motions To Dismiss of defendants, provided in part as follows:

1. The taking of the deposition of the plaintiff Harry J. Strong pursuant to Rules 28 and 30 of the Federal Rules of Civil Procedure and prior orders in this matter, which proceeding was interrupted by the refusal of the said Harry J. Strong to testify on October 10th, 1955, will be resumed on December 6th, 1955, @ 11:00 o'clock A. M. at 725 Davenport Bank Building, Davenport, Iowa.

2. The plaintiff, Harry J. Strong, is ordered to appear at the time and place stated in paragraph 1 and then and thereafter in the regular course of procedure to submit to the taking of his deposition.

3. In the event that the said Harry J. Strong shall fail to comply with the foregoing order, then Division I and Division III, paragraph 1, of the Motions To Dismiss of defendants will be granted as against plaintiffs Harry J. Strong and First Iowa Hydro Electric Cooperative and an order of dismissal supplementary to this order will thereupon be made without any further notice or hearing.

My order dated November 29, 1955, provided that the taking of the deposition of Harry J. Strong should be resumed on December 20, 1955, at 11:00 o'clock A. M. instead of December 6, 1955.

On December 20, 1955, the plaintiff Harry J. Strong attended as required by the earlier orders referred to above but explicitly refused to testify. He was informed by me that the consequence of his refusal would be the entry by me of an order of dismissal of this action, in so far as brought by him and First Iowa Hydro Electric Cooperative. In response he merely stated his understanding of that consequence.

Supplementing my said order dated November 21, 1955, and in conformity with that order, it is ordered that this action be and the same hereby is dismissed as to plaintiffs Harry J. Strong and First Iowa Hydro Electric Cooperative, such dismissal to operate as an adjudication upon the merits.

This order will be served by the clerk by mail, in the case of defendants by serving their attorneys of record, and in the case of plaintiffs by serving their attorneys of record and plaintiffs themselves.

Dated December 22, 1955.

EDWARD A. DOERR,
Special Master.

[fol. 147] (Petition of Plaintiff, First Iowa Hydro Electric Cooperative, and Individual Plaintiffs for Review.)

(Filed in U. S. District Court on January 3, 1956.)

United States District Court
Southern District Of Iowa
Davenport Division

First Iowa Hydro Electric Cooperative, et al.,
Plaintiffs,
No. 1-224. vs. Civil.
Iowa Illinois Gas & Electric Company, et al.,
Defendants.

Come now the plaintiff First Iowa Hydro Electric Cooperative, and the individual plaintiffs in the above entitled cause and their Attorneys of Record in said cause in

behalf of the plaintiffs, and in behalf of the Attorneys of Record, personally and individually, and as such Attorneys of Record for plaintiffs in said cause, and respectfully petition this court to review an order made by Edward A. Doerr, Special Master, in said cause, on December 22, 1955, dismissing said cause, with prejudice, and to revise said order, vacate it, and set it aside for the following reasons and upon each of the following grounds.

(1) The Special Master had no power, authority, or jurisdiction to make such an order for the reason that the order made on September 21, 1955, appointing the Special Master, was illegal and void and amounted to an abuse of discretion upon the part of the United States District Judge who made the order, in view of the fact that a timely and proper demand for a jury trial had been filed in this cause by plaintiffs, the effect of the order appointing the Special Master was to effectually deprive the plaintiffs and their Attorneys of Record of a jury trial and the right to present all of their evidence to a jury, in violation of the right to a jury trial guaranteed to them by the pro- [fol. 148] visions of the Seventh Amendment to the Constitution of the United States and resulted in a denial to plaintiffs and their counsel, who have an interest in the subject matter of the litigation, of due process of law in violation of the rights guaranteed them by the provisions of the Fifth amendment to the Constitution of the United States. The result of the attempted reference to the Special Master was in contravention of the rights of plaintiffs and their Attorneys of Record under both the Seventh and Fifth amendments to the Constitution of the United States. The order appointing the Special Master constituted an abuse of discretion upon the part of the United States District Court for the Southern District of Iowa, and the Special Master had no power or authority or jurisdiction to act under the facts and circumstances revealed in the whole record, this being an action for triple damages for violation of the Sherman and Clayton Acts, the order referring the entire case to the Special Master violated the provisions of Rule 53 (b) which provides that "a reference to a Master shall be the exception and not the rule" and that in jury cases "a reference shall be made only when the issues are complicated." There is nothing complicated about the

issues in this case. A demand for jury was timely made. Therefore, there should not have been a reference of the case to a Special Master, who is attempting to perform the duties and functions of the court, in violation of the rights of these plaintiffs and their Attorneys of Record, for the reasons hereinbefore set forth.

(2) Even if the order appointing the Special Master were valid and he had the power to act, still, he would have no power, authority, or jurisdiction under Rule 37 of the Federal Rules of Civil Procedure or any other of said rules to dismiss the above entitled cause as such action would amount to usurping the power and function reserved only to and vested in the court. Therefore, the order made by the Special Master attempting to dismiss the case, with prejudice, with respect to the plaintiff Corporation and the plaintiff Harry J. Stong was in excess of his jurisdiction [fol. 149] and void as he was not vested with the power to dismiss the case, as the court, only, would have the power to dismiss the case.

(3) Even if the Special Master had jurisdiction to enter an order dismissing the above entitled cause, with prejudice, his drastic action under the facts and circumstances disclosed by the record in this cause, constituted an abuse of discretion and was arbitrary and a violation of the rights of plaintiffs and their Attorneys of Record who have an interest in the subject matter of the law suit.

(4) That the principal assets of the Corporation Plaintiff, First Iowa Hydro Electric Cooperative, consist of the license to construct the Moscow dam on the Cedar River, issued by the Federal Power Commission and this pending law suit. That to dismiss as to the corporation plaintiff this law suit in which four other individual plaintiffs are interested and involved because of the refusal of one individual plaintiff to give testimony in connection with a discovery deposition is an abuse of discretion on the part of the Special Master, would penalize the other four individual plaintiffs and their Attorneys of Record in this case, who are powerless to protect themselves in the premises, and amounts to a deprivation of property without due process of law as to all plaintiffs, and their Attorneys of Record, in violation of the provisions of Section 1 of the Four

teenth Amendment to the Constitution of the United States and would amount to a denial to said persons of equal protection of the laws as guaranteed to them by Section I of the Fourteenth Amendment and due process of law guaranteed to them by the Fifth Amendment to the Constitution of the United States.

(5) The Attorneys of Record for plaintiffs in this law suit, as shown by prior proceedings in this court, have an interest in the subject matter of the litigation by reason of the nature and effect of their contract of employment, time, work, and effort that they have expended on the case. Therefore, the order of the Special Master attempting to dismiss [fol. 150] the case with prejudice, with respect to the plaintiff corporation and Harry J. Strong deprives these Attorneys of Record of their rights and interests in violation of the provisions of Section I of the Fourteenth Amendment to the Constitution of the United States guaranteeing due process of law and in violation of the rights guaranteed said Attorneys of Record for plaintiffs by the provisions of the Fifth Amendment to the Constitution of the United States and would amount to the infliction of a penalty upon these Attorneys of Record for plaintiffs who have been guilty of no wrong doing or dereliction of duty in behalf of their clients in this case and would effectively deprive them of a substantial right and interest to successfully prosecute this law in behalf of all plaintiffs and their Attorneys of Record, to a final conclusion.

(6) At all times since the above entitled cause was instituted the Attorneys of Record for plaintiffs have to the best of their ability attempted to diligently and loyally protect and safe guard the rights and interests of all plaintiffs, at every stage of the proceedings. That the action of the Special Master in attempting to dismiss, with prejudice, the cause of action as to the plaintiff corporation and Harry J. Strong would constitute an arbitrary abuse of discretion, if he had the power to act at all, and would inflict a penalty upon Attorneys of Record, possessing an interest in the subject matter of the case, who have been without fault and entirely blameless in the conduct of the litigation in behalf of said Corporation plaintiff and all individual plaintiffs in the case. Upon each occasion when these Attorneys

of Record for plaintiffs appeared before the Special Master in connection with any proceedings in the cause, following his appointment, they have prior to the commencement of each proceeding, protested and objected to proceeding be- [fol. 151] fore the Special Master for the reasons and upon the grounds dictated into the record upon each of those occasions and questioned the right of the United States District Court to appoint a Special Master in this cause and have at every stage of the proceedings since his appointment challenged the legality and validity of the order appointing the Special Master and his acts and proceedings under and by virtue of said order.

Respectfully submitted,

JAMES D. FRANCE,

XAVIER C. NADY,
France, France & Nady,
First National Bank Building,
Tipton, Iowa.

JAMES R. McMANUS,

ALLAN R. SHEPHERD,
417 Fleming Building,
Des Moines, Iowa,
Attorneys for Plaintiffs.

[fol. 152] Report of Special Master.

(Filed in U. S. District Court on January 4, 1956)

To The Court:

Edward A. Doerr, having been appointed Special Master herein by order of the court dated September 21st, 1955, submits this report as such Special Master, and so respectfully states:

1. In the course of proceedings on reference, the deposition of plaintiff Harry J. Strong was scheduled to be taken, pursuant to Rules 28 and 30 of the Federal Rules of Civil Procedure on October 10th, 1955. At the time and

place fixed for such taking the said plaintiff was present but refused to testify and, after announcing such refusal and against the advice and urging of the Special Master, left the room and place fixed for such taking.

2. Defendants on the same day filed with the Special Master their Motions To Dismiss (the same being filed in the office of the Clerk under date of October 11th, 1955). Said Motions To Dismiss were in part based upon such refusal by plaintiff Harry J. Strong to testify.

3. The Special Master on November 21st, 1955, made an order on said Motions To Dismiss. In so far as such order related to the refusal by plaintiff Harry J. Strong to testify the order provided, in substance (and as thereafter modified with respect to the date only) as follows:

(a) That the taking of the deposition of said plaintiff should be resumed on December 20th, 1955.

(b) That plaintiff was required then to appear and submit to the taking of his deposition.

(c) That failing compliance with the foregoing, the said Motions To Dismiss should be granted as against plaintiffs Harry J. Strong and First Iowa Hydro Electric Cooperative only (the said Harry J. Strong being an officer and managing agent of said First Iowa Hydro Electric Cooperative).

[fol. 153] 4. On December 20th, 1955, at the time and place so fixed for the resumption of the taking of his deposition, the said Harry J. Strong was present but again stated his refusal to testify.

5. On December 22nd, 1955, because of such refusal, the Special Master, by order supplementing his order dated November 21st, 1955, dismissed this action as to plaintiffs Harry J. Strong and First Iowa Hydro Electric Cooperative, stating that such dismissal should operate as an adjudication upon the merits.

6. The findings of fact and conclusions of law of the Special Master which are material to this report are stated

in said orders of November 21st, 1955, and December 22nd, 1955, which orders are on file in the office of the Clerk and, together with said Motions To Dismiss, are made a part of this report.

7. Filed herewith are transcripts of certain proceedings and evidence in hearings before the Special Master which are, or may be urged by one or another of the parties to be, material to this report. Such transcripts are entitled in this action and are identified by mark and reference to the subject matter as follows:

"Exhibit 1 to Report of Special Master"—proceedings and evidence on hearing of motion by plaintiffs for leave to remove their attorneys.

"Exhibit 2 to Report of Special Master"—proceedings on October 10, 1955, in connection with scheduled taking of deposition of plaintiff Harry J. Strong.

"Exhibit 3 to Report of Special Master"—further proceedings on October 10, 1955, in such connection.

"Exhibit 4 to Report of Special Master"—proceedings of November 10, 1955, prior to argument of defendants' motions to dismiss.

"Exhibit 5 to Report of Special Master"—proceedings on December 20, 1955, in connection with scheduled resumption of the taking of deposition of plaintiff Harry J. Strong.

The transcripts so marked and identified are made a part of this report. The Special Master certifies that said transcripts truly state the proceedings and evidence which they purport to state and include a record of all proceedings and evidence before the Special Master, to the extent material to this report. All written orders made in the course of the reference by the Special Master have been filed in the office of the Clerk and all written applications made by the parties during the course of such reference have been so filed. To the extent that such orders and applications are, or may be urged by any party to be, material to this report, they are made a part of the report.

8. Said orders of November 21st, 1955, and December 22nd, 1955, are necessarily subject to confirmation by the Court upon its consideration of this report. Otherwise said orders are final as to plaintiffs Harry J. Strong and First Iowa Hydro Electric Cooperative. Because of such final [fol. 154] nature of said orders, the Special Master presently submits this report in relation to said orders, at the same time reserving (subject to the pleasure of the Court) for further proceedings, to be had pursuant to the Court's said order dated September 21st, 1955, all other matters referred to the Special Master by the Court's said order.

The Special Master respectfully recommends that the said orders made by the Special Master dated November 21st, 1955, and December 22nd, 1955, be confirmed and this report approved.

EDWARD A. DOERR,
Special Master.

[fol. 155] (Motion of Defendant, Union Electric Power Company, to Dismiss, and Joinder by Other Defendants)

(Filed in U. S. District Court on January 10, 1956)

Division I.

Defendant Union Electric Power Company, through its attorney, Robert H. Walker, moves the Court pursuant to Rule 37(d) of the Federal Rules of Civil Procedure for an order dismissing the Complaint of the Plaintiff, F. A. E. Gillmor, against these Defendants upon the following grounds:

1. For the willful failure and refusal of F. A. E. Gillmor as Plaintiff, and as President and Director of Plaintiff First Iowa Hydro Electric Cooperative to testify at the time set by the Special Master for the taking of his deposition, which order provided for the taking of said deposition at 11:00 o'clock A. M. on January 10, A. D., 1956, proper notice thereof having been previously given to the said F. A. E. Gillmor, and for the willful action of said F. A. E. Gillmor in refusing to testify and leaving the

hearing room, and in refusing to remain to be interrogated, and for the willful refusal of said F. A. E. Gillmor to testify after being advised by the Special Master so to do.

Division II.

Defendant Union Electric Power Company through its attorney, Robert H. Walker, moves the Court for an order [fol. 156] dismissing the Complaint of the Plaintiff F. A. E. Gillmor, against these Defendants, upon the following ground:

1. For the failure of the Plaintiff F. A. E. Gillmor to deposit into the registry of this Court the sum of $2,500 pursuant to court orders entered September 21, 1955, and September 27, 1955, although the record affirmatively shows that this plaintiff had ample time within which to make such deposit and to comply with such orders.

Division III.

Defendant Union Electric Power Company through its attorney, Robert H. Walker, moves the Court, pursuant to Rule 41(b) of the Federal Rules of Civil Procedure to dismiss this action as to Plaintiff F. A. E. Gillmor for failure of the Plaintiff to prosecute the action, or to comply with the Federal Rules in Civil Procedure or the orders of the Court in the following respects:

1. For the willful failure and refusal of said F. A. E. Gillmor, as plaintiff, and as President and Director of Plaintiff First Iowa Hydro Electric Cooperative to testify at his deposition, noted to be taken on January 10, 1956, at Room 725 of the Davenport Bank Building, in accordance with the Order of the Special Master, proper notice thereof having been previously given to the said F. A. E. Gillmor, and for the willful action of the said F. A. E. Gillmor in leaving the hearing room and in refusing to remain to be interrogated in accordance with the Order of the Special Master, and for the willful refusal of said F. A. E. Gillmor to testify after having been advised by the Special Master so to do.

2. For the failure of the plaintiff, F. A. E. Gillmor to deposit into the registry of this Court the sum of $2,500 pur

suant to court orders entered September 21, 1955, and September 27, 1955, although the record in this case affirmatively shows that plaintiff had ample time within which to make such deposit and to comply with such orders.

[fol. 157] Division IV.

Defendant Union Electric Power Company, through its attorney Robert H. Walker, moves the Court, pursuant to Rules 37(d) and 41(b) of the Federal Rules of Civil Procedure to dismiss the Complaint of the Plaintiff First Iowa Hydro Electric Cooperative on the following additional grounds:

1. For the willful failure and refusal of F. A. E. Gillmor, as President, officer and director of the Plaintiff First Iowa Hydro Electric Cooperative, to testify at the taking of his deposition, although the said F. A. E. Gillmor was given notice of the time and place of the said hearing by the Special Master, and which said hearing was to be held on January 10, 1956, at 11:00 o'clock A. M., in Room 725 of the Davenport Bank Building.

2. For the failure of F. A. E. Gillmor, as President of First Iowa Hydro Electric Cooperative, to cause the Cooperative to deposit into the registry of this Court the sum of $2,500 pursuant to court orders entered September 21, 1955, and September 27, 1955, although the record in this case affirmatively shows that Plaintiff First Iowa Hydro Electric Cooperative had ample funds with which to make such deposit and had adequate time in which to comply with such orders.

3. For the willful refusal of said F. A. E. Gillmor to testify as President, officer and director of First Iowa Hydro Electric Cooperative, although directed so to do by the Special Master on January 10, 1956, at 11:00 o'clock A. M. at the time of said hearing.

Defendant Union Electric Power Company requests the Court in making any orders of dismissal to make such dismissal with prejudice as against plaintiffs, and all of them, and requests the Court to assess all costs against the plaintiffs and each of them.

Defendant Union Electric Power Company further requests that the foregoing matters be set for hearing upon notice to plaintiffs and their attorneys of record as the [fol. 158] Court may prescribe.

UNION ELECTRIC POWER COMPANY,
By Robert H. Walker,
Its Attorney.

Joinder by Other Defendants.

The Undersigned defendants, having been required by Order of Court entered May 16, 1955, to participate in taking of depositions noticed by defendant, Union Electric Power Company, including the taking of the deposition of F. A. E. Gillmor and now having been deprived of that right, join in and adopt in all particulars the foregoing motions to dismiss of defendant Union Electric Power Company.

IOWA-ILLINOIS GAS AND ELECTRIC COMPANY,
By Larned A. Waterman, Its Attorney.

IOWA POWER AND LIGHT COMPANY,
By Howard Steele, Its Attorney.

IOWA SOUTHERN UTILITIES COMPANY,
By Robert Valentine, Its Attorney.

INTERSTATE POWER COMPANY,
By E. Marshall Thomas, Its Attorney.

KANSAS CITY POWER AND LIGHT COMPANY,
By Joseph J. Kelly, Jr., Its Attorney.

IOWA ELECTRIC LIGHT AND POWER COMPANY,

NORTHWESTERN LIGHT AND POWER COMPANY,
By V. C. Shuttleworth, Their Attorney.

IOWA PUBLIC SERVICE COMPANY,
By Myron L. Sifford, Its Attorney.

IOWA UTILITIES ASSOCIATION,
By Sherman J. Markman, Its Attorney.

[fol. 159]

Acknowledgment of Service.

The undersigned acknowledges receipt of copy of the foregoing this 10th day of January, 1956.

JAMES R. McMANUS.
Attorney of record for Plaintiff.

In the United States District Court for the Southern District of Iowa, Davenport Division.

Affidavit of Service.

I, Robert H. Walker, one of the attorneys for Union Electric Power Company, depose and state that I served a copy of the foregoing motions by depositing a copy of the same in the United States mail to the last known address to the following persons, and at the following addresses, on January 10, 1956:

F. A. E. Gillmor
Donahue, Iowa

Carl J. Mitzner
R. F. D.
Tipton, Iowa

P. H. Naber
Hershey Building
Muscatine, Iowa

Harry Imel
P.O. Box 486
Muscatine, Iowa

Harry J. Strong
1011 East High
Davenport, Iowa

First Iowa Hydro Electric Cooperative
Muscatine, Iowa

ROBERT H. WALKER,
Attorney for
Union Electric Power Company.

Subscribed and sworn to before me this 10th day of January, A. D., 1956.

(Seal) DONALD H. SITZ,
Notary Public.

[fol. 160] (Order of Special Master on Motion of Defendants to Dismiss)

(Filed in U. S. District Court on January 16, 1956)

The Motions to Dismiss made by defendants and filed January 10th, 1956, are heard by me this date, pursuant to my prior order, of which notice has been duly given. Plaintiffs and defendants appear as recited in stenographic record of the instant hearing.

The motions are in four divisions and certain subdivisions, stating the following essential grounds:—

Division I—Motion to dismiss as to plaintiff F. A. E. Gillmor, made pursuant to Rule 37 (d), by reason of his refusal to testify on deposition, such refusal being considered as, in effect, a failure to appear.

Division II—Motion to dismiss as to the same plaintiff, without reference to any specific rule, by reason of his failure to make a deposit of $2,500 in conformity with orders of the court.

Division III, subdivision 1—Motion to dismiss as to the same plaintiff, made pursuant to Rule 41 (b), by reason of such refusal to testify.

Division III, subdivision 2—Motion to dismiss as to the same plaintiff, made pursuant to Rule 41 (b), by reason of his failure to make such deposit.

Division IV, subdivisions 1 and 3—Motion to dismiss as to plaintiff First Iowa Hydro Electric Cooperative, made pursuant to Rules 37 (d) and 41 (b) by reason of the refusal of F. A. E. Gillmor, president and director of the cooperative, so to testify.

Division IV, subdivision 2—Motion to dismiss as to the [fol. 161] plaintiff cooperative, made pursuant to Rule

41 (b), by reason of the failure of F. A. E. Gillmor, president of the cooperative, to cause the cooperative to deposit the $2,500 sum above referred to.

The record discloses that on January 10th, 1956, the plaintiff F. A. E. Gillmor was present at the time and place duly fixed for the taking of his testimony in discovery deposition proceedings in this cause; that when called up to be sworn he asked to be excused from testifying; that, upon being advised by me that he could not be excused but was required to testify, he read a statement of refusal to testify; that he thereupon left the room and place provided for the taking of his testimony.

The incident of refusal is essentially a repetition, with a difference in the actor only, of an earlier incident of refusal to testify by plaintiff Harry J. Strong. In that incident the plaintiff Strong refused to testify on October 10th, 1955; in consequence of such refusal, I, on November 21st, 1955, ordered the case dismissed as to him and First Iowa Hydro Electric Cooperative, subject, however, to a provision giving the plaintiff Strong a further and final opportunity to testify at a future time then fixed; at the time so fixed, the plaintiff Strong adhered to his refusal to testify; in consequence of such continued refusal, I, on December 22nd, 1955, confirmed the order of dismissal made by me on November 21, 1955.

Notice of the motion to dismiss as to plaintiffs Strong and First Iowa Hydro Electric Cooperative was duly given to plaintiff F. A. E. Gillmor, and my orders of November 21st, 1955, and December 22nd, 1955, were served on him so that he had ample time before January 10th, 1956, within which to consider his own course and the consequences of a refusal on his part to testify. My order of November 21st, 1955, provided in part:—

"The degree of solicitude shown for plaintiffs Harry J. Strong and First Iowa Hydro Electric Cooperative should not be considered by any party as establishing a precedent."

The findings made and conclusions stated in my order of November 21st, 1955 (except for the reference to bank-

ruptcy proceedings in that order) also apply to, and are adopted with respect to, the refusal of plaintiff Gillmor to testify; provided that, under the circumstances recited above, I conclude that no opportunity should be accorded him to retract his refusal.

The findings made and conclusions stated in my order of November 21st, 1955, also apply to, and are adopted with respect to, the failure of plaintiffs Gillmor and First Iowa Hydro Electric Cooperative to pay into court the sum of $2,500 as required by order of the Court. I also note that the Court has set for January 20th next a hearing with respect to the failure of plaintiffs to pay said sum (among other matters). The pendency of that [fol. 162] matter before the Court is an additional reason for my denial of the Motions to Dismiss now before me in so far as based on failure of any plaintiff to pay or cause to be paid the $2,500 sum.

In addition to an order of dismissal the present Motions to Dismiss ask that costs be assessed against the plaintiffs. I infer from the record that the Court may have in contemplation the assessment to defendants of costs on discovery deposition proceedings or some portion of such costs. Such costs are by far the most substantial item of total costs to date. The assessment of costs must ultimately be passed upon by the Court in any case. Under the circumstances, I consider it more proper for me to refrain from ruling with respect to assessment of costs.

It is ordered:

1. The Motions to Dismiss are granted in so far as based upon Division I, upon Division III, subdivision 1, and upon Division IV, subdivisions 1 and 3.

2. The Motions to Dismiss are denied in so far as based upon Division II, upon Division III, subdivision 2, and upon Division IV, subdivision 2, without prejudice to renewal of motion to dismiss on the same grounds at any time.

3. The motion to assess costs against plaintiffs is denied without prejudice to its renewal at any time.

4. In accordance with paragraph 1 above this action is dismissed as to plaintiffs F. A. E. Gillmor and First Iowa Hydro Electric Cooperative, such dismissal to operate as an adjudication upon the merits; provided that such dismissal is expressly made subject to confirmation by the Court upon the filing of my report referring to such dismissal.

This order will be served by the Clerk by mail, in the case of defendants by serving their attorney of record and in the case of plaintiffs by serving their attorneys of record and plaintiffs themselves.

Dated January 16, 1956.

EDWARD A. DOERR,
Special Master

[fol. 163] (Supplemental Report of Special Master

(Filed in U. S. District Court on January 17, 1956)

Edward A. Doerr, having been appointed Special Master herein by order of the Court dated September 21st, 1955, and having, on January 4th, 1956, filed a report as such, submits this, his supplemental report as such Special Master and so respectfully states:—

1. In the course of proceedings on reference, the deposition of plaintiff F. A. E. Gillmor was duly scheduled to be taken on January 10th, 1956, pursuant to Rules 28 and 30 of the Federal Rules of Civil Procedure. At the time and place fixed for such taking, the said plaintiff was present but refused to testify and, after announcing such refusal and contrary to the advice and directions of the Special Master then given to him, left the room and place fixed for such hearing.

2. Following such refusal, defendants filed their Motion to Dismiss on January 10th, 1956. Said Motions to Dismiss are based in part upon the refusal by the said plaintiff to testify and move for dismissal of this action as to said plaintiff and plaintiff First Iowa Hydro Electric Cooperative.

3. On January 16th, 1956, the Special Master made an order on said motion. In so far as said order related to the refusal by said plaintiff to testify, the motion was granted and this action was dismissed as to plaintiff F. A. E. Gillmor and First Iowa Hydro Electric Cooperative (the individual plaintiff being both director and officer of the plaintiff cooperative). Said order expressly provides that the dismissal is to operate as an adjudication upon the merits.

4. Said Motions to Dismiss are also based in part upon the failure by plaintiffs F. A. E. Gillmor and First Iowa Hydro Electric Cooperative to pay into the registry of the Court the sum of $2,500 in accordance with orders of the Court dated September 21st, 1955, and September 27th, [fol. 164] 1955. The Special Master's said order dated January 16th, 1956, denies said Motions to Dismiss in so far as based on said grounds (without prejudice to renewal of motion) and denies the assessment of costs against plaintiffs (without prejudice to renewal of motion for such assessment).

5. The findings of fact and conclusions of law of the Special Master which are material to this supplemental report are stated in said order of January 16th, 1956, and in the certain order dated November 21st, 1955, to the extent incorporated in the later order by reference. Said orders and said Motions to Dismiss are on file in the office of the Clerk and are made a part of this report.

6. Filed herewith is a transcript of the proceedings in the January 10th, 1956, hearing before the Special Master. Such transcript is entitled in this matter and is identified by mark of "Exhibit A to Supplemental Report of Special Master."

The transcript so marked together with Exhibits 1 to 5, inclusive, to the report of the Special Master, filed herein on January 4, 1956, are made a part of this report. The Special Master certifies that the transcript herewith filed truly states the proceedings which it purports to state and, together with said Exhibits 1 to 5, inclusive, comprises a record of all proceedings and evidence before the Special Master to the extent material to this supplemental report.

All written orders made by the Special Master and all written applications made by the parties in the course of the reference have been filed in the office of the Clerk. To the extent that such orders and applications are, or may be urged by any party to be, material, they are made a part of this supplemental report.

7. Said order of January 16th, 1956, is expressly made subject to confirmation by the Court upon its consideration of this supplemental report. Otherwise said order finally disposes of this action as to plaintiffs F. A. E. Gillmor and First Iowa Hydro Electric Cooperative. Because of such final nature of said order, the Special Master presently submits this report in relation to said order, at the same time reserving (subject to the pleasure of the Court) all matters other than those so disposed of by this supplemental report and the report of the Special Master filed herein on January 4th, 1956.

8. The Special Master submits the following statement of time spent by him to date on the reference:

(a) Time spent in and with relation to deposition proceedings 2 and $\frac{1}{2}$ days and 26 and $\frac{1}{4}$ hours.

(b) Time spent otherwise than as in (a) 1 and $\frac{1}{2}$ days and 30 hours.

The Special Master asks allowance of compensation to him at the rate of $150.00 per day and $25.00 per hour for the time so spent and further asks reimbursement for certain expenditures, all as shown in the following statement:

For time spent in and with relation to deposition proceedings	$1,031.25
[fol. 165] For time otherwise spent	2475.00
1955	
Oct. 28 Paid Northwestern Bell Telephone Co. phone calls	7.61
Nov. 2 Paid Donald E. Saxton Court Reporter	86.00

Nov. 2	Paid Paul J. Carlson—Court Reporter	15.60
Nov. 23	Paid Paul J. Carlson—Court Reporter	19.50
Dec. 23	Paid Paul J. Carlson—Court Reporter	10.60
Total		$3,645.56

The Special Master respectfully recommends that the said order made by him ~~of date~~ January 16th, 1956, be confirmed and this supplemental report approved.

EDWARD A. DOERR
Special Master

[fol. 166] (Exceptions and Objections of Plaintiffs to Report of Special Master filed January 4, 1956.)

(Filed in U. S. District Court on January 19, 1956.)

Come now the plaintiffs in the above entitled cause and their Attorneys of Record in said cause in behalf of the plaintiffs and in behalf of the Attorneys of Record as such Attorneys of Record for plaintiffs in this cause and object and except to the report of the Special Master, which was filed in the office of the Clerk of this Court on January 4, 1956 and which was served on these plaintiffs by mail, coming into their hands on January 11, 1956, and as grounds, therefore, respectfully show to the Court.

1. These parties incorporate herein by reference the "Petition for Review" in which they ask the Court to revise an order made on December 22, 1955, by Edward A. Doerr, Special Master, dismissing the above entitled cause with prejudice and said Petition for Review is hereby incorporated herein with the same effect as if set out verbatim and urged as a ground for objection and exception to the said report of the Special Master, filed January 4, 1956, and ask the court to refuse to confirm said report or to approve the same or the action indicated or taken by the Special Master in connection with the matters set forth in the order of December 22, 1955, and the report of the Special Master filed January 4, 1956.

[fol. 167] 2. The order appointing Edward A. Doerr as Special Master in this cause was illegal and constituted an abuse of discretion upon the part of Judge William F. Riley, in that no extraordinary circumstances or conditions appeared from the record in this case authorizing such appointment within the meaning and intent of the Federal Rules of Civil Procedure permitting a reference or appointment of a Master.

Under this record, the facts were not sufficient to warrant the appointment or reference by the District Judge of the issues to a Special Master or to authorize the filing of findings of facts and conclusions of law by such Special Master.

3. The fact that the Judge's calendar is congested in this district and that the Judge is busy with other matters would not constitute a legal reason for the reference of this case or an excuse or justification for the appointment of a Special Master or give the District Judge the right to appoint such Special Master under the rules of civil procedure.

4. The action of the trial Judge in making an order appointing a Special Master with the broad powers attempted to be delegated to such Master as found in the order of reference in this case appointing Edward A. Doerr as Master amounts to a refusal on the part of the Judge to try the case and amounts to a failure and refusal upon the part of the Judge to perform a duty and a judicial function imposed on him by law, constitutes an abuse of discretion and a failure to observe the Federal Rules of Civil procedure prescribed by the Supreme Court of the United States and is beyond the Court's legal power under the rules which permit a reference, and the order is illegal and void.

5. The order appointing Edward A. Doerr as Special Master denies to the plaintiffs and their counsel of record, the right to have this case tried by a Judge and jury, although a jury has been timely demanded, and amounts to [fol. 168] an attempt upon the part of the Trial Court to abdicate its duty to determine by the Judge and jury the controversy presented and an effort to devolve that duty

upon one of its officers and subjects the parties to needless expense and delay as the Master's bills filed in this case have already exceeded $5,000.00 and the depositions are not yet completed.

6. The action of a Special Master in attempting to dismiss the case will prejudice as to all parties was arbitrary, illegal, and beyond the power and jurisdiction of the Special Master and under the record in this case, this Court would have no right or power or authority to confirm such order, even if the Court had the power to refer the matter to a Special Master. Therefore, the action of the Special Master on December 22, 1955 and on January 4, 1956, as set out above, was illegal and void for all the reasons given.

These Attorneys further submit that the plaintiffs, Harry Strong and F. A. E. Gillmor now seek a dismissal of the cause by indirect means and by order of Court, knowing full well that should they come into this Court and move for such dismissal for the sole purpose of discharging and getting rid of their present Attorneys of Record, such a motion would be denied and now the present subterfuge is an attempt to obtain a result indirectly which is not permitted to them by law and that for the Court to permit itself to be hood-winked by such means into ordering such dismissal would result in great financial loss and waste of effort, both to said Attorneys of Record and the majority of members of said Cooperative and these Attorneys of Record and the majority of the directors would be deprived of rights and interests guaranteed to them both by provisions of the constitution above set forth and by statutes and the Rules of Civil Procedure.

8. The parties further show to the Court that for each and all the reasons [hereto for] given, the order appointing the Special Master, the proceedings before the Special Mas- [fol. 169] ter and the action taken by the Special Master in attempting to dismiss this case with prejudice resulted in a deprivation of property without due process of law as to all plaintiffs and their Attorneys of Record in violation of the rights to due process of law guaranteed to them by the provisions of Section One of the Fourteenth amendment to the Constitution of the United States and of due process of

law guaranteed to them by the Fifth amendment to the Constitution of the United States and results in a denial of their constitutional rights to trial by jury in violation of a right to a jury trial guaranteed to them by the Seventh amendment to the Constitution of the United States, as the parties have made timely demand for trial by jury in this case.

Respectfully submitted,

JAMES D. FRANCE,

XAVIER C. NADY,
First National Bank Bldg.,
Tipton, Iowa,

JAMES R. McMANUS,

ALLAN R. SHEPHERD,
417 Fleming Bldg.,
Des Moines, Iowa;
Attorneys for Plaintiffs.

[fol. 170] (Petition of Plaintiffs for Review.)

(Filed in U. S. District Court on January 19, 1956.)

In The United States District Court
For The Southern District Of Iowa
Davenport Division

First Iowa Hydro Electric Cooperative, et al.,
Plaintiffs,
No. 1-224. vs. Civil Action.
Iowa Illinois Gas and Electric Company, et al.,
Defendants.

Come now the plaintiffs and their Attorneys of Record in said cause in behalf of the plaintiffs and in behalf of the Attorneys of Record for plaintiffs in said cause and respectfully petition this Court to review an order made by Edward A. Doerr, Special Master in said cause on January 16, 1956, dismissing the above entitled cause with prejudice as to the plaintiff, First Iowa Hydro Electric Cooperative and the plaintiff, F. A. E. Gillmor, and to revise said order,

vacate it, and set it aside for the reasons set forth in the Petition for Review heretofore filed by the same parties, asking the court to revise, vacate and set aside an order made by Edward A. Doerr, Special Master in said cause on December 22, 1955, and said petition for review is incorporated herein by reference with the same force and effect as if set forth at length herein and the reasons therein given are advanced as grounds for this Court to revise, vacate and set aside said order made by the Special Master, January 16, 1956, attempting to dismiss the cause as to plaintiffs, F. A. E. Gillmor and First Iowa Hydro Electric Cooperative.

JAMES D. FRANCE,

XAVIER C. NADY,

JAMES R. McMANUS,

ALLAN R. SHEPHERD,
Attorneys for Plaintiffs.

[fol. 171] (Motion of Plaintiffs to vacate Order appointing Special Master)

(Filed in U. S. District Court on January 19, 1956.)

Come now the plaintiffs and their Attorneys of Record, in behalf of plaintiffs and in behalf of their Attorneys of Record, and move the court to make an order vacating and setting aside the order made by this Court on Spection 21, 1955, appointing Edward A. Doerr Special Master in this cause, for each and all of the reasons set forth in the Petitions For Review of the orders of the Special Master which were filed in this cause with respect to the orders made by the Special Master on December 22, 1955, and January 16, 1956, and the grounds stated in the objections and exceptions to the report of the Special Master which was filed January 4, 1956, and to the supplemental report which was filed January 17, 1956, and the objections urged and interposed orally in the record by these parties prior to each hearing and proceeding before said Special Master and said reasons, grounds and objections are hereby incorporated

herein by reference thereto and made a part hereof as fully as if set forth at length herein, in support of this motion.

JAMES R. McMANUS,

ALLAN R. SHEPHERD,
417 Fleming Bldg.,
Des Moines, Iowa,

JAMES D. FRANCE,

XAVIER C. NADY,
First National Bk. Bldg.,
Tipton, Iowa,
Attorneys for Plaintiffs.

[fol. 172] (Memorandum of District Court of Decision and Order for Judgment.)

(Filed in U. S. District Court on January 25, 1956.)

The following matters were heard by the Court with consent of all parties and were submitted on January 20, 1956;

1. The motions of defendants to dismiss the complaint as to plaintiff Harry J. Strong and all other plaintiffs, filed on October 10, 1955.

2. The Report of the Special Master filed on January 4, 1956, and his order filed December 22, 1955.

3. The motions of defendants to dismiss the complaint as to plaintiff F. A. E. Gillmor and as to plaintiff First Iowa Hydro Electric Cooperative, filed January 16, 1956.

4. The Supplemental Report of the Special Master filed January 17, 1956, and his order filed January 16, 1956.

5. The Petition for Review filed by plaintiffs on January 3, 1956, and their Petition for Review filed January 19, 1956.

[fol. 173] 6. The exceptions and objections of plaintiffs to the January 4, 1956 Report of the Special Master, filed January 19, 1956.

7. The objections and exceptions of plaintiffs to the January 17, 1956 Supplemental Report of the Special Master, filed January 19, 1956.

8. The motion of plaintiffs to vacate the order appointing the Special Master, filed January 19, 1956.

9. The motion of defendants to strike plaintiffs' motion to vacate order appointing Special Master, made in open court on January 20, 1956.

10. The motion of defendants renewing that portion of their October 10, 1955 and their January 16, 1956 motions to dismiss for failure of plaintiffs to comply with the Court's deposit orders of September 21 and September 27, 1955, made orally in open court on January 20, 1956.

Plaintiffs appeared by their attorneys of record, James R. McManus, Allan R. Shepherd, Xavier C. Nady and James D. France. Union Electric Power Company appeared by its attorney, Robert H. Walker. Iowa-Illinois Gas and Electric Company appeared by its attorney, Larned A. Waterman. Iowa Power and Light Company appeared by its attorney, Howard A. Steele. Iowa Southern Utilities Company appeared by its attorneys, Maxwell A. O'Brien and Robert Valentine. Interstate Power Company appeared by its attorneys, E. Marshall Thomas and Clement F. Springer. Kansas City Power and Light Company appeared by its attorneys, Joseph J. Kelly, Jr. and Earl Smith. Iowa Electric Light and Power Company and Northwestern Light and Power Company appeared by their attorneys, V. Craven Shuttleworth, Tyrell M. Ingersoll and Harry E. Wilmarth. Iowa Public Service Company appeared by its attorney, Sylvester F. Wadden, and [fol. 174] Iowa Utilities Association appeared by its attorneys, Frederic M. Miller and Sherwin J. Markman. Defendant Wisconsin Power and Light Co. was not served with process and has not appeared in this action. Reference herein to "defendants" excludes such defendant. In conformity with the Rules, the Court makes—

Findings of Fact

The Court finds the following chronology of events is pertinent to the matters before the Court:

1. The action was commenced February 18, 1954, and seeks the recovery of $120,000,000 in treble damages for alleged violations of the federal antitrust laws.

2. On March 10, 1954, Union Electric Power Company, one of the defendants, noticed the depositions of the individual plaintiffs and others.

3. On May 16, 1955, the Court ordered the deposition of one of the plaintiffs, Harry J. Strong, the secretary, treasurer, director and general manager of plaintiff, First Iowa Hydro Electric Cooperative. In this order the Court also constrained all the defendants to participate in the deposition.

4. On June 6, 1955, the deposition of Harry J. Strong commenced pursuant to court order and under the appointment of Wayne G. Cook, as Special Master, with the prior consent of all parties.

5. On June 23, 1955, the Special Master ordered the production of the bank records of the deponent because of the commingling of funds of the corporate plaintiff in his personal account, and ordered a two-weeks' recess in the deposition to permit the defendants an opportunity to obtain and inspect such records.

6. On July 12, 1955, the deposition of Harry J. Strong recessed until July 25, 1955, to permit the Court to dispose of matters raised by plaintiffs in connection with their proposed efforts to remove the Special Master. (On July 18, 1955, plaintiffs filed a motion to remove Wayne G. Cook as Special Master, which the Court subsequently denied.)

[fol. 175] 7. On July 22, 1955, the Court ordered the deposition of Harry J. Strong to resume on August 1, 1955.

8. On August 1, 1955, the Special Master, at the request of plaintiffs, postponed to September 6, 1955, the date for the deposition of Harry J. Strong in order to give plaintiffs an opportunity to determine whether or not an appeal would be taken from the Court's order denying plaintiffs' motion to vacate the appointment of the Special Master.

9. On September 2, 1955, the Court, on its own initiative, but on behalf of the plaintiffs, ordered that the deposition of Harry J. Strong be resumed at a date later to be determined by the Court.

10. On September 15, 1955, the Court ordered that the deposition of Harry J. Strong be resumed on October 3, 1955.

11. On September 16, 1955, plaintiffs filed a motion for leave to remove their attorneys of record.

12. On September 21, 1955, the Court, having accepted the resignation of Wayne G. Cook, appointed Edward A. Doerr as Special Master. The powers accorded Mr. Doerr were intentionally expanded by the Court pursuant to Rule 53 partly because of collateral issues raised by the plaintiffs which were not connected with the pending discovery proceedings. In the same order, the Court also ordered the deposit forthwith into the registry of this Court of the sum of $2,500.00 by plaintiffs and the sum of $2,500.00 by defendants, to defray the fees and disbursements of the Special Master. This sum was duly paid by defendants.

13. On September 26, 1955, plaintiff Harry J. Strong, on behalf of all plaintiffs, filed a motion to defer the deposit. On September 27 the Court entered an order denying the motion and again ordered the deposit to be made forthwith.

14. On September 28, 1955, the Special Master, upon the informal request of Harry J. Strong, postponed the resumption date of his deposition to October 10, 1955.

[fol. 176] 15. On September 29, 1955, the Special Master ordered that the motion of plaintiffs to discharge their attorneys be heard on October 3, 1955.

16. On October 3, 1955, plaintiffs filed in the United States Court of Appeals for the Eighth Circuit a motion for leave to file petition for mandamus and injunction and for temporary stay order. This motion was denied by the appellate court on the same day.

17. On October 3, 1955, plaintiffs' motion to discharge their attorneys was heard and submitted to the Special Master. Plaintiffs defaulted at this hearing. On October 5, 1955, the Special Master nonetheless entered a conditional order of discharge.

18. On October 10, 1955, Harry J. Strong at the resumption of his deposition expressly refused to testify, although instructed so to do twice by the Special Master. On the same date defendant Union Electric Power Company filed motions to dismiss, which were joined in by all other defendants. (These motions were filed with the Special Master on October 10, 1955, and with the Clerk on October 11, 1955.)

19. On October 10, 1955, plaintiff Harry J. Strong filed an affidavit of prejudice directed against the presiding judge.

20. On October 17, 1955, plaintiffs, individually, and without acting through their counsel of record, filed various motions, including one to expunge the deposition of Harry J. Strong. On October 21, 1955, the Court entered its order overruling the affidavit of prejudice filed by plaintiff Harry J. Strong.

21. On October 28, 1955, the Special Master entered an order striking from the court file the various motions filed individually by plaintiffs on October 17, 1955.

22. On November 18, 1955, the motions to dismiss filed by defendants on October 10, 1955 were heard and submitted to the Special Master.

23. On November 21, 1955, the Special Master entered his order finding that the refusal of Harry J. Strong to testify on October 10, 1955 was flagrant, willful and with- [fol. 177] out justification or excuse and had the necessary effect of disrupting orderly procedure and hampering defendants in making their defense. The Special Master, however, ordered that the deponent be given an additional and final chance to testify and ordered his deposition to resume on December 6, 1955. The Special Master also found that the failure of all the plaintiffs to make the

deposit required under the September 21 and 27 orders of the Court was flagrant, willful and without justification or excuse.

24. On November 28, 1955, certain individual plaintiffs, F. A. E. Gillmor, Harry J. Strong and P. H. Naber, filed notice of appeal to the United States Court of Appeals for the Eighth Circuit from the order of the Special Master of October 28, 1955, striking the various motions theretofore filed by the individual plaintiffs. No review of such order by this Court was ever sought by any plaintiff.

25. On November 29, 1955, the Special Master, upon the oral request of plaintiffs through their attorneys of record, delayed the resumption of Harry J. Strong's deposition until December 20, 1955.

26. On December 20, 1955, plaintiff Harry J. Strong at the resumption of his deposition again expressly refused to testify, although he was then and had been previously advised by the Special Master of the consequences of such refusal. The witness stated that he would take his chances on a dismissal and adhered in his refusal to testify. The witness was informed that the defendants were invoking the sanctions permitted by Rules 37(d) and 41(b), which would result in a dismissal of the action as to plaintiffs Harry J. Strong and First Iowa Hydro Electric Cooperative.

27. On December 22, 1955, the Special Master entered his order of dismissal as to plaintiffs Harry J. Strong and First Iowa Hydro Electric Cooperative, which the Court treats as a recommendation of dismissal.

28. On December 22, 1955, the Special Master order the deposition of plaintiff F. A. E. Gillmor, president and director of plaintiff First Iowa Hydro Electric Cooperative, to commence on January 10, 1956.

[fol. 178] 29. On January 3, 1956, plaintiffs by their attorneys of record filed a petition to review the order of the Special Master entered on December 22, 1955.

30. On January 4, 1956, the Special Master filed his Report on the dismissal of the action as to plaintiffs Harry J. Strong and First Iowa Hydro Electric Cooperative.

31: On January 9, 1956, the Court assigned for hearing on January 20, 1956, the Report of the Special Master, plaintiffs' petition for review filed January 3, 1956, and the failure of plaintiffs to comply with the two deposit orders of the Court.

32. On January 10, 1956, plaintiff F. A. E. Gillmor at the taking of his deposition refused to testify, after being required by the Special Master to testify. Two of the defendants, orally and in the presence of F. A. E. Gillmor, moved to dismiss the action as to him upon the same grounds urged in defendants' motions to dismiss filed October 10, 1955. On the same day, all of the defendants joined in written motions of dismissal as to F. A. E. Gillmor and First Iowa Hydro Electric Cooperative.

33. On January 16, 1956, defendants' motions to dismiss were heard and submitted to the Special Master, who entered his order of dismissal on the same date, dismissing the action as to plaintiffs F. A. E. Gillmor and First Iowa Hydro Electric Cooperative, subject to confirmation by the Court.

34. On January 17, 1956, the Special Master filed his Supplemental Report on the dismissal of the action as to plaintiffs F. A. E. Gillmor and First Iowa Hydro Electric Cooperative. On the same day the Court ordered that such Supplemental Report be heard with the other matters assigned for hearing on January 20, 1956.

35. On January 19, 1956, plaintiffs filed their exceptions and objections to the Report of the Special Master filed January 4, 1956, their petition for review of the order of the Special Master filed January 16, 1956, and their objections and exceptions to the Supplemental Report of the Special Master filed January 17, 1956.

36. On January 19, 1956, plaintiffs filed with the Court their motion to vacate the appointment of a Special Master.

[fol. 179] 37. On January 20, 1956, in open court, defendants orally moved to strike plaintiffs' motion to vacate

the appointment of the Special Master and renewed their motions to dismiss the action as to all plaintiffs for failure to comply with the two deposit orders of the Court.

The Court makes the following additional findings of fact:

1. General.

I find that proper and timely service of pleadings, motions, orders and reports was made in all required instances. The several motions of defendants and the orders and reports of the Special Master were served personally on each of the named plaintiffs as well as upon their attorneys of record. Plaintiffs have not objected or excepted to any of the facts stated in any of the orders or reports of the Special Master, and such facts stand unchallenged. Defendants have not sought to impose any contempt penalty upon any of the plaintiffs, but have invoked the sanctions afforded by Rules 37(d) and 41(b). I find that the attorneys of record for the plaintiffs have no interest in the subject matter of the litigation. On October 5, 1955, the Special Master entered a conditional order of discharge as a result of his hearing on October 3, 1955 on the motion of plaintiffs to discharge their attorneys of record. I find that the plaintiffs have failed to exhaust the remedies afforded them by the conditional terms of that order and have failed to seek any review by this Court of the October 5 and 28, 1955 orders of the Special Master. The October 5 and 28 orders of the Special Master were ex parte as to defendants. The plaintiffs' claim that they are unrepresented by any attorney is without merit. I find that the plaintiffs are represented by James D. France, Xavier C. Nady, James R. McManus, Allan R. Shepherd, as attorneys of record, and the firm of Haley, Doty and Schellenberg appear of counsel.

2. Plaintiffs' Motion to Vacate the Appointment of the Special Master and Defendants' Motion to Strike the Same.

On May 23, 1955, the Court appointed Wayne G. Took as Special Master, following a conference with counsel for plaintiffs and counsel for several of the defendants. I find that plaintiffs have initially consented to the appointment of a Special Master.

[fol. 180] Mr. Edward A. Doerr was appointed as Special Master by the Court on September 21, 1955, following the resignation of Mr. Wayne G. Cook. Plaintiffs' motion to vacate the appointment of Mr. Doerr was not made to the Court until January 19, 1956, after the Special Master had issued various orders, rulings and reports. I find the plaintiffs' motion was not timely filed with the Court.

The complaint seeks recovery of $120,000,000 in treble damages and equitable relief under the antitrust laws. The period of time covered by the complaint extends from 1938 to 1954. There are ten defendants, whose separate answers pose evidentiary and procedural problems of great magnitude. The issues in this action involve engineering, financing, economic and other technical problems of vast complexity. The discovery proceedings, still in their early stages, have resulted in volumes of testimony and documents. The record discloses many difficult problems pertaining to marketability of power, project design, economic and engineering feasibility, financing methods and expectations, costs of construction and power, additional and numerous expert witnesses, and other allied matters which would be the subject of extended discovery proceedings requiring continual supervision to prevent oppression or hardship to any party. The documents which plaintiffs have voluntarily produced in response to defendants' interrogatories and which plaintiffs have produced under order of Court and order of the Special Master are detailed and voluminous. For example, the transcripts of the Federal Power Commission hearings exceed 5,000 pages.

I find that the issues are complicated and that the reference was not only proper but necessary in the interests of justice. This action, peculiarly and appropriately, requires the appointment of a Special Master.

The objection of the plaintiffs to the appointment of the Special Master, insofar as it is based upon an alleged deprivation of the right to trial by jury, must be denied. Rule 53 permits such an appointment, and this action required it. In my order of January 9, 1956, I pointed out that the appointment of the Special Master does not and cannot deprive plaintiffs of their right of trial by jury if their re-
[fol. 181] quest therefor has been seasonably made, nor

does it empower the Special Master ultimately to hear and determine the issues between the parties upon a trial of this cause. I further find that the appointment of the Special Master, Edward A. Doerr, was without prejudice to the plaintiffs.

3. Refusal to Deposit.

On September 21, 1955, the Court ordered plaintiffs to deposit forthwith the sum of $2,500.00 to defray fees and disbursements of the Special Master. A like sum was commanded of defendants and was duly paid by them into the registry of this Court. On September 26, Harry J. Strong, on behalf of plaintiffs, requested a deferment of their deposit, but this was denied by court order entered September 27, 1955, and the deposit was again ordered to be made by plaintiffs forthwith. The record discloses that plaintiffs had sufficient funds to make the deposit. Plaintiffs at no time sought to avoid the deposit on the grounds of insufficient funds. None of the individual plaintiffs has tendered the whole or any part of the required deposit. I find that plaintiffs had sufficient funds to make the deposit. I find that the failure of plaintiffs to make the required deposit was flagrant, willful and without justification or excuse. I find that such failure constituted a refusal to comply with the orders of this Court and should be subject to the sanctions permitted by Rule 41(b).

In their motions filed on October 10, 1955, defendants sought, under Rule 41(b), dismissal of the action against all of the plaintiffs for their failure to comply with the deposit orders of this Court. The motions are well taken.

4. The Refusal to Testify.

The deposition of Harry J. Strong was begun under an order of this Court, and its resumption was ordered both by this Court and by the Special Master. On September 28, 1955, the Special Master, upon the informal request of the witness, postponed the resumption date to October 10, 1955. On October 10, 1955, Harry J. Strong expressly refused to testify, although instructed twice by the Special Master to testify. The witness left the hearing room while one of the [fol. 182] defendants was attempting to advise him that sanctions would be sought under Rule 37(d), should he

persist in his refusal to testify. Despite such conduct, the Special Master gave the witness a final chance to testify and ordered his deposition to resume on December 6, 1955. In this order, which was entered on November 21, 1955, the Special Master found that the witness' refusal to testify was flagrant, willful and without justification or excuse and had the necessary effect of disrupting orderly procedure and hampering defendants in making their defense. The witness was and is secretary, treasurer, director and general manager of plaintiff First Iowa Hydro Electric Cooperative. The order provided that, if the witness again refused to testify, the action would be dismissed as to plaintiffs Harry J. Strong and First Iowa Hydro Electric Cooperative. The order was served on all of the named plaintiffs and on their attorneys of record. At the request of plaintiffs through their attorneys of record, the resumption date was postponed until December 20, 1955. On December 20, 1955, the witness was again present and again expressly refused to testify. He stated that he would take his chances on a dismissal of the action.

I find that plaintiff, Harry J. Strong, was secretary, treasurer, director and managing agent of plaintiff First Iowa Hydro Electric Cooperative. I find that his refusal to testify was flagrant, willful and without justification or excuse, and had the necessary effect of disrupting orderly procedure and was prejudicial to the defendants in making their defense. I find that the witness was given ample notice of the consequences of his failure to resume his deposition and was given ample opportunity to testify. On October 10, 1955, the defendants moved to dismiss the action as to plaintiffs Harry J. Strong and First Iowa Hydro Electric Cooperative, under Rule 37(d) and under Rule 41 (b). I find that the motions are well taken.

The Court order of March 10, 1954, provided that the deposition of Harry J. Strong was to proceed until completed. I find that that order and the subsequent orders of the Court and Special Master dealing with the resumption of Harry J. Strong's deposition were ignored by the witness. His conduct was contumacious, his attitude defiant, his reasons for refusing to testify invalid.

[fol. 183] On December 22, 1955, the Special Master ordered the deposition of plaintiff F. A. E. Gillmor, president and director of plaintiff First Iowa Hydro Electric Cooperative, to commence on January 10, 1956. On January 10, 1956, F. A. E. Gillmor refused to testify, although admonished by the Special Master. Instead, this plaintiff read a self-serving statement into the record and started to leave the hearing room. Before he departed, two of the defendants, orally and in his presence, moved to dismiss the action as to him upon the same grounds urged in defendants' motions to dismiss filed October 10, 1955. The witness had been served with copies of the Special Master's order of December 22, 1955, dismissing the action as to plaintiffs Harry J. Strong and First Iowa Hydro Electric Cooperative, and he was served with copy of the Special Master's report filed January 4, 1956. He was fully advised of the consequences of his refusal to testify.

I find that plaintiff F. A. E. Gillmor was president and director of plaintiff First Iowa Hydro Electric Cooperative. I find that the refusal of the witness to testify was flagrant, willful, and without justification or excuse and had the necessary effect of disrupting orderly procedure and was prejudicial to the defendants in making their defense. I find that, under the circumstances, there was no necessity for according this witness another chance to testify. As with witness Strong, the conduct of witness Gillmor was contumacious, his attitude defiant, his reasons for refusing to testify invalid. The [disrepect] which these parties exhibited toward judicial process is the proper subject of sanctions sought by defendants. On January 10, 1956, all of the defendants joined in written motions of dismissal of the complaint as to plaintiffs F. A. E. Gillmor and First Iowa Hydro Electric Cooperative. I find that the motions are well taken.

5. The Orders and Reports of the Special Master.

On January 4, 1956, the Special Master filed his Report, based on his orders of November 21, 1955 and December 22, 1955 pertaining to the dismissal of the action as to plaintiffs Harry J. Strong and First Iowa Hydro Electric Cooperative. On January 17, 1956, the Special Master filed

his Supplement Report, based on his order of January 16, 1956 dismissing the action as to plaintiffs F. A. E. Gillmor and First Iowa Hydro Electric Cooperative.

[fol. 184] Plaintiffs have not objected or excepted to any of the facts stated in such orders and reports, and such facts stand unchallenged.

I find that the facts stated in the aforesaid orders and Reports of the Special Master are correct and admitted. I find that the dismissals recommended by the Special Master should operate as an adjudication upon the merits.

I sustain the aforesaid orders of the Special Master, approve and adopt his orders, Reports and recommendations, except with reference to the deposit orders of this Court, and find that the action should be dismissed as to plaintiffs Harry J. Strong, F. A. E. Gillmor and First Iowa Hydro Electric Cooperative for the willful refusal of plaintiffs Strong and Gillmor, both officers and one the managing agent of the corporate plaintiff, to testify at the taking of their depositions.

6. Miscellaneous.

The record in this action does not disclose that any of the five directors of the corporate plaintiff directed its managing agent or any officers to testify or made any attempt to comply with the deposit orders.

None of the individual plaintiffs and no officer or representative of the corporate plaintiff other than the attorneys of record appeared or was physically present at any time during the course of the hearing held on January 20, 1956.

I find that the interests of justice would not be served by affording plaintiffs Strong and Gillmor another opportunity to testify or granting plaintiffs further time in which to comply with the deposit orders. Those who flaunt judicial authority may do so at the minimum peril of dismissal. Courts must be equally concerned with rights of a defendant. Those rights have been prejudiced in the present action by the conduct of plaintiffs Strong and Gillmor.

The fees and disbursements of the Special Master, Edward A. Doerr, contained in the Supplemental Report filed January 17, 1956, are reasonable and are hereby approved.

The fees and disbursements of both Special Masters should be borne equally by plaintiffs and defendants. Defendants should recover all other costs.

[fol. 185] Conclusions Of Law.

The Court makes the following conclusions of law:

1. The attorneys of record for the plaintiffs have no interest in the subject matter of this action.

2. The plaintiffs' petitions for review were heard by the Court on January 20, 1956. The relief therein sought must be denied. The exceptions and objections of plaintiffs to the Report of the Special Master filed January 4, 1956 and to the Supplemental Report of the Special Master filed January 17, 1956, should be overruled.

3. The motion of defendants renewing that portion of their October 10, 1955 and January 16, 1956 motions to dismiss for failure of the plaintiffs to comply with the Court's deposit orders must be sustained.

4. Any objection to the appointment of Edward A. Doerr as Special Master would of necessity have to be made to the Court appointing such Special Master. The plaintiffs failed to make timely objection to such appointment and have waived objection to such appointment.

5. The appointment of Edward A. Doerr as Special Master is valid and does not infringe upon or violate any of plaintiffs' constitutional rights.

6. Plaintiffs' motion to vacate the appointment of a Special Master should be overruled. Defendants' motion to strike plaintiffs' motion to vacate such appointment should be sustained.

7. The power to impose sanctions is a necessary corollary of the power to administer justice. Apart from rule or statute, a court has the inherent power to require a deposit of security for costs or to dismiss an action as against a

party who has failed to comply with an order of court. These matters are also expressly covered by the Federal Rules of Civil Procedure. I conclude that the action should be dismissed as against all of the plaintiffs for their willful failure to comply with the deposit orders of this Court.

[fol. 186] 8. I conclude that sanctions may be imposed under Rule 41 for the failure of a plaintiff to comply with court orders, and that the action should be dismissed as to Harry J. Strong under Rule 41. I conclude that the action as to plaintiff Harry J. Strong and plaintiff First Iowa Hydro Electric Cooperative should also be dismissed under Rule 37 for the failure of the witness, as a party and as an officer and managing agent of a corporate party, to resume his deposition.

9. I conclude that the action should be dismissed under Rule 37 as to F. A. E. Gillmor and First Iowa Hydro Electric Cooperative for the refusal of plaintiff F. A. E. Gillmor, president of plaintiff First Iowa Hydro Electric Cooperative, to testify in his deposition.

10. I further conclude that the dismissals are within the inherent power of the Court.

11. I conclude that the orders and reports and recommendations of the Special Master should be confirmed, except with reference to the deposit orders of this Court, and that defendants' motions to dismiss should be sustained.

12. I conclude that the dismissals should operate as an adjudication on the merits.

Order For Judgment.

It Is Ordered, Adjudged And Decreed that:

1. The action should be and is hereby dismissed as to plaintiffs, First Iowa Hydro Electric Cooperative, F. A. E. Gillmor, Carl J. Mitzner, Harry J. Strong, Harry Imel, and P. H. Naber.

2. Such dismissal shall operate as an adjudication upon the merits.

3. The fees and disbursements of Wayne G. Cook as Special Master and Edward A. Doerr as Special Master

[fol. 187] shall be assessed against and paid by the plaintiffs and defendants equally. The compensation of Wayne G. Cook was initially ordered to be advanced by defendants, but subject to final order of this Court. The fees and disbursements of both Special Masters shall be taxed one-half against plaintiffs and one-half against defendants, and defendants shall be credited for all advancements heretofore made. The fees and disbursements of Edward A. Doerr shall be paid within thirty days of entry of this judgment. Upon failure of either party to make such payment within the time allowed, the Clerk shall forthwith issue a writ of execution in favor of the Special Master, and against the delinquent party or parties. All other costs are taxed against plaintiffs, severally.

The Clerk is directed to enter judgment forthwith.

Dated at Des Moines, Iowa, this 25th day of January, 1956.

WILLIAM F. RILEY,
United States District Judge.

[fol. 188] (Judgment.)

(Filed in U. S. District Court on January 25, 1956.)

United States District Court
Southern District Of Iowa
Davehport Division

First Iowa Hydro Electric Cooperative, F. A. E. Gillmor, Carl J. Mitzner, Harry J. Strong, Harry Imel, and P. H. Naber, Plaintiffs,

No. 1-224. vs. Civil.

Iowa-Illinois Gas And Electric Co., Iowa Power and Light Co., Iowa Southern Utilities Co., Interstate Power Co., Union Electric Power Co., Kansas City Power And Light Co., Iowa Electric Light And Power Co., Northwest Light And Power Co., Wisconsin Power And Light Co., Iowa Public Service Co., Iowa Utilities Association, Defendants.

It Is Ordered, Adjudged And Decreed that:

1. The action should be and is hereby dismissed as to plaintiffs, First Iowa Hydro Electric Cooperative, F. A. E.

Gillmor, Carl J. Mitzner, Harry J. Strong, Harry Imel, and P. H. Naber.

2. Such dismissal shall operate as an adjudication upon the merits.

3. The fees and disbursements of Wayne G. Cook as Special Master and Edward A. Doerr as Special Master shall be assessed against and paid by the plaintiffs and defendants equally. The compensation of Wayne G. Cook was initially ordered to be advanced by defendants, but subject to final order of this Court. The fees and disbursements of both Special Masters shall be taxed one-half against plaintiffs and one-half against defendants, and defendants shall be credited for all advancements heretofore made. The fees and disbursements of Edward A. Doerr shall be paid within thirty days of entry of this judgment. Upon failure of either party to make such payment within the time allowed, the Clerk shall forthwith issue a writ of execution in favor of the Special Master, and against the delinquent party or parties. All other costs are taxed against plaintiffs, severally.

The Clerk is directed to enter judgment forthwith.

Dated at Des Moines, Iowa, this 25th day of January, 1956.

WILLIAM F. RILEY,
United States District Judge.

[fol. 190] Notice of Appeal

(Filed in U. S. District Court on February 16, 1956)

United States District Court
Southern District of Iowa
Davenport Division

First Iowa Hydro Electric Cooperative, F. A. E. Gillmor, Carl J. Mitzner, Harry J. Strong, Harry Imel, and P. H. Naber, Plaintiffs,
Civil vs. No. 1-224
Iowa-Illinois Gas and Electric Co., Iowa Power and Light Co., Iowa Southern Utilities Co., Interstate Power

Co., Union Electric Power Co., Kansas City Power and Light Co., Iowa Electric Light and Power Co., Northwest Light and Power Co., Wisconsin Power and Light Co., Iowa Public Service Co., Iowa Utilities Association, Defendants

Notice is hereby given that First Iowa Hydro Electric Cooperative, F. A. E. Gillmor, Harry J. Strong, and Harry Imel, plaintiffs above named, hereby appeal to the United States Court of Appeals for the Eighth Circuit from the final judgment entered in this action on the 25th day of January, 1956.

FIRST IOWA HYDRO ELECTRIC COOPERATIVE

By Harry J. Strong
Secretary

F. A. E. GILLMOR
Individual Plaintiff

HARRY J. STRONG
Individual Plaintiff

HARRY IMEL
Individual Plaintiff

J. ROGER WOLLENBERG

Haley, Doty & Wollenberg
1735 DeSales Street, N. W.
Washington 6, D. C.

Attorney for Appellants

Dated February 15, 1956

[fol. 191] Acknowledgement

Before me, Ethna White, a Notary Public in and for the District of Columbia, personally appeared on February 15, 1956, J. Roger Wollenberg, known to me as a member of the law firm of Haley, Doty & Wollenberg, 1735 DeSales Street, N. W., Washington, D. C., and acknowledged the signature of J. Roger Wollenberg on

the foregoing Notice of Appeal in Civil No. 1-224 to be his signature.

ETHNA WHITE
Notary Public, D. C.

My commission expires February 14, 1961.

[fol. 192] Designation of Contents of Record on Appeal

(Filed in U. S. District Court on March 19, 1956)

Come now First Iowa Hydro Electric Cooperative, F. A. E. Gillmor, Harry J. Strong, and Harry Imel, appellants, pursuant to Rule 75(a) of the Federal Rules of Civil Procedure and Rule 8(b) of the Rules of the United States Court of Appeals for the Eighth Circuit and designate the entire record, proceedings, and evidence in the above-entitled proceeding to be contained in the record on appeal in connection with the appeal filed herein on February 15, 1956 on behalf of the above-named appellants.

J. ROGER WOLLENBERG
Haley, Doty & Wollenberg
1735 De Sales Street, N. W.
Washington 6, D. C.
Attorney for Appellants

Dated March 16, 1956

[fol. 193] First Iowa Hydro Electric Cooperative et al, v. Iowa-Illinois Gas and Electric Co. (Case No. 15548)

Contents of Record.

Docket Entries

1954

Feb. 18,
Filed Complaint.

Mar. 10,
Filed Notice to Take Depositions Upon Oral

1955

May 16, Filed Order that Union Electric Power Co. will take depositions of Harry J. Strong at 9:00 A.M. on June 6, 1955, either at Davenport Bk. Bldg., or Grand Jury room in the Federal Bldg., in Davenport, Iowa, rental expense to be borne by defts; depositions to be taken from 9:00 A.M. to 12:00 noon and from 2:00 P.M. to 5:00 P.M. until completed, Saturdays and Sundays excepted; Michael T. Organ or Earl W. Radford, both of Chicago, appointed Commissioner; all documents heretofore filed by plaintiffs to be produced at the time of taking deposition; Harry J. Strong is directed to appear and present himself for examination until concluded; and all defendants are privileged to appear and examine or cross-examine the witness, Riley, J. (Ent. 2 OJ 551) (Notices to attys. mailed May 16, 1955).

May 23, Filed Order appointing Wayne G. Cook as Special Master in connection with taking of discovery depositions, Riley, J. (Ent. 2 OJ 558) (Notice to attys. mailed May 23, 1955).

June 4, Filed Memorandum order denying plaintiffs' Motion to assess attorney fees, Riley, J. (Ent. 2 OJ 563) (Notice to counsel mailed June 6, 1955).

July 30, Entered Order that original transcript of the discovery depositions of Harry J. Strong shall be filed with the Commissioner and held by the Commissioner until signed and certified, when it shall be sealed and filed with the Clerk and opened only by order of court; copies of transcript may be made to counsel of record and to Special Master but no copy of such copies, or any parts thereof shall be made or used by any counsel; the Com-
[fol. 194] missioner shall permit examination of the transcript by counsel and the Special Master only, Riley, J. (Ent. 2 OJ 611) (Notice to Attys. mailed July 30, 1955).

Aug. 29, Filed Notice of Entry of Appearance of Robert M. Bell and Bell, Farrar & Scott as attorneys for plaintiffs.

Aug. 31, Filed Plaintiff's Attorneys Motion to Quash Appearance of Bell, Farrar and Scott as attorneys for plaintiff.

Sept. 2, Filed Motion of Bell, Farrar & Scott, attorneys to withdraw their appearance at attorneys for the plaintiffs.

Sept. 2, Filed Clerk's Court Minutes.

Sept. 6, Entered Order with withdrawal of appearance of Bell, Farrar & Scott is accepted; and that Petition to Intervene shall not be filed, Riley, J. (Ent. 2 OJ 635) (Copies mailed to Bell, Farrar & Scott; Harry J. Strong, McManus, Shepherd, Nady and all attorneys of record.)

Sept. 16, Filed Motion for leave to remove France, France & Nady and James R. McManus and Allan R. Shepherd as attorneys for plaintiffs herein (Copies mailed to James D. France, X. C. Nady, James R. McManus and Allan R. Shepherd).

Sept. 21, Filed order accepting resignation of Wayne G. Cook as Special Master, Riley, J. (Ent. 2 OJ 670) (Copies mailed to all counsel, the individual pltffs., First Iowa Hydro Electric Cooperative, Wayne G. Cook and Edward A. Doerr on Sept. 22, 1955).

Sept. 21, Filed Order appointing Edward A. Doerr as Special Master, and that $2,500.00 shall be paid by pltffs. and $2,500.00 by defts. into the Registry of the Court for allowance of fees and disbursements of Special Master, Riley, J. (Ent. 2 OJ 671) (Copies mailed to all counsel, the individual pltfs. First Iowa Hydro Electric Cooperative, Wayne G. Cook and Edward A. Doerr on Sept. 22, 1955).

Sept. 26, Filed Plaintiffs' Motion to defer deposit of funds.

Sept. 27, Filed Memorandum and order denying motion to defer requirement of deposit, Riley, J. (Ent. 2 OJ 675).

Sept. 27, Entered order denying motion to defer requirement of deposit and that deposit of $2,500.00 be
[fol. 195] made forthwith, Riley, J. (Ent. 2 OJ 675) (Notice mailed to Edward A. Doerr, X. C. Nady, J. R. McManus and Harry L. Strong).

Sept. 29, Filed Order that motion of Pltffs. entitled "Motion for Leave to remove attys. for plaintiffs herein" shall be heard on October 3, 1955 at 2:00 P.M. in the Petit Jury Room, Federal Bldg., Davenport, Iowa, Edward A. Doerr, Special Master (Copies mailed to all counsel and all plaintiffs).

Sept. 29, Filed Resistance of France, France & Nady, James R. McManus and Allan R. Shepherd to motion to remove attorneys and application by attorneys for affirmative relief, with proof of service.

Sept. 30, Motion for Leave to Intervene.

Oct. 5, Filed Order overruling motion of Plaintiffs for leave to remove France, France & Nady and James R. McManus and Allan R. Shepherd as attorneys for plaintiffs herein and resistance to motion to remove attorneys and application by attorneys for affirmative relief, is denied, Edward A. Doerr, Special Master (Copies mailed to all plaintiffs and all counsel).

Oct. 5, Filed Opinion of Edward A. Doerr, Special Master (Copies mailed to all plaintiffs and all counsel).

Oct. 5, Filed Order that plaintiffs may submit written statements re Motion for leave to Intervene by October 12, 1955, Edward A. Doerr, Special Master (Copies mailed to all plaintiffs and all counsel).

Oct. 6, Filed Order filed on Oct. 3, 1955 in the U. S. Court of Appeals for the Eighth Circuit denying

motion for leave to file petition for mandamus and injunction for want of jurisdiction.

Oct. 10, Filed Affidavit of Prejudice by Harry J. Strong.

Oct. 11, Filed Motion of Deft. Union Electric Power Co. to Dismiss and joinder by other defendants and affidavit of service.

Oct. 11, Filed Amendment to Order of Oct. 6, 1955 adding "Defts. took no part in the hearing which was ex parte as to them", Edward A. Doerr, Special Master (Copies mailed to all pltfs. and all counsel).

Oct. 17, Filed Motion by plaintiffs to [exponge] from the record order dated Oct. 5, 1955, said order pertaining to a hearing on Oct. 3, 1955.

Oct. 17, Filed Plaintiffs' Resistance to Defts' Motion to Dismiss and application by pltfs. for affirmative relief. (Copies mailed to attys. for defts.)

Removed from file in accordance with Order of Special Master Dated October 28, 1955

Oct. 21, Filed Ruling and order on affidavit of Prejudice, entered order that affidavit of prejudice is not timely or sufficient and for other reasons fails to meet requirements of Sec. 144, Title 28, U.S.C.A; that proceedings be continued as though affidavit had not been filed, Riley, J. (Ent. 2 O.J. 693) (Copies mailed to all pltfs., their attys. of record, all counsel for defts. and to Special Master)

Oct. 24, Filed Order that hearing will be held at 930 Davenport Bk. Bldg., Davenport, Iowa on Oct. 28, 1955 at 10:30 A.M. re entry of proposed form of Order (Copies mailed to all pltfs. and their attys. of record).

[fol. 196]

Oct. 28, Filed Order directing that Motion to [exponge] a document called deposition of Harry J. Strong, Motion to [exponge] from the record order dated Oct. 5, 1955, said order pertaining to a hearing on Oct. 3, 1955, Motion to [exponge] from the record an order dated Oct. 11, 1955 and order pertaining to motions to dismiss and hearing on affidavit of prejudice, motion to [exponge] an order of Judge Wm. F. Riley dated Oct. 14, 1955 in reference to affidavit of prejudice and resistance to defendant's motion to dismiss and application for affirmative relief and Motion in Resistance to the substitution of any party plaintiff be stricken from the files and shall be physically removed; no pleading tendered by plaintiffs for filing not signed by an attorney of record shall be filed by the Clerk; no pleading tendered by plaintiffs shall be filed by the Clerk until pltfs. pay into the Registry of the Court the sum of $2,500.00 as per orders of Sept. 21st and Sept. 27th, 1955; no pleading which may be filed by defts. is required to be served on pltfs., except upon attys. of record for pltfs. no order which may be filed is required to be served on pltfs. except upon their attys. of record, Edward A. Doerr, Special Master (Copies mailed to all pltfs. their attys. of record and to attys. of record for defendants).

Nov. 9, Filed Order for the payment of Fees of Special Master, Wayne G. Cook, Riley, J. (Ent. 3 OJ 16).

Nov. 15, Filed Order for the payment of Fees of Special Master showing payment of $3,043.38 on Nov. 10, 1955 signed by Wayne G. Cook (Copies mailed to pltfs. and their attys. of record).

Nov. 21, Filed Order on Motion to Dismiss, that deposition of Harry J. Strong will be resumed on Dec. 6, 1955 at 11:00 o'clock A. M. at 725 Davenport Bank Bldg., Davenport, Iowa; that Harry J. Strong appear at said time for taking of deposition; in the event that Harry J. Strong shall not comply, then Div. I and Div. III para. 1, of Mo-

tion to Dismiss will be granted against Harry J. Strong and First Iowa Hydro Electric Cooperative and an order of dismissal supplementary to this order will be made; Div. II and Div. III, para. 2 of Motions to Dismiss of Defts. are denied without prejudice to the renewal thereof at any time, Edward A. Doerr, Special Master (Copies mailed to all pltfs. their attorneys of record and to attys. of record for defts.).

Dec. 2, Filed Order amending order of Nov. 29, 1955 by adding: "In making the application for delay herein referred to pltfs. by their attys. of record, have expressly reserved the objections to the
[fol. 197] order of reference herein which are asserted upon constitutional grounds and which have been stated at the several hearings in which pltfs. have taken part, following the appointment of the present special master" Edward A. Doerr (Copies mailed to all pltfs., their attys. of record and to attys. of record for defts.).

Dec. 22, Filed Order dismissing action as to plaintiffs Harry J. Strong, and First Iowa Hydro Electric Cooperative, such dismissal to operate as an adjudication upon the merits, Edward A. Doerr, Special Master (Copies mailed to all pltfs., their attys. of record, attys. of record for defts. and Michael T. Organ, Comm.)

1956

Jan. 3, Filed Plaintiffs' Petition for Review and Proof of Service.

Jan. 4, Filed Report of Special Master.

Jan. 4, Filed Exhibits 1, 2, 3, 4 and 5 to Report of Special Master.

Jan. 10, Filed Motion of Union Electric Company to Dismiss as to E. A. E. Gillmor, and Joinder by other defendants.

Jan. 16, Filed Order that Motions to Dismiss are granted as based upon Div. I, Upon Div. III, Subdivision I, and upon Div. IX, subdivisions 1 and 3; Motions to Dismiss are denied as based upon Div. II,

Upon Div. III, subdivision 2, and upon Div. IV, subdivision 2, without prejudice to renewal of motion to dismiss; Motion to assess costs against pltfs. is denied without prejudice to its renewal; as per Para. 1 above, action is dismissed as to pltfs. F. A. E. Gillmor and First Iowa Hydro Electric Cooperative, such dismissal to operate as an adjudication upon the merits, provided that such dismissal is expressly made subject to confirmation by the Court, Edward A. Doerr, Special Master. (Copies mailed to all pltfs., their attys. of record and attys. for defts.).

Jan. 17, Filed Supplemental Report of Special Master.

Jan. 17, Filed Exhibit A to Supplemental Report of Special Master.

Jan. 19, Filed Petition of Plaintiffs for Review of an Order made by Special Master on Jan. 16, 1956.

[fol. 198]

Jan. 19, Filed Plaintiffs' Exceptions and Objections to Report of Special Master filed Jan. 4, 1956.

Jan. 19, Filed Plaintiffs' Objections and Exceptions to Supplemental Report of Special Master filed Jan. 17, 1956.

Jan. 19, Filed Plaintiffs' Motion to Vacate Order appointing Special Master.

Jan. 20, Filed Clerk's Court Minutes.

Jan. 25, Filed Memorandum of Decision and Order for Judgment, Riley, J.

Jan. 25, Entered Judgment dismissing action as to plaintiffs, First Iowa Hydro Electric Cooperative, F. A. E. Gillmor, Carl J. Mitzner, Harry J. Strong, Harry Imel and P. H. Naber, such dismissal operating as an adjudication upon the merits; the fees and disbursements of Wayne G. Cook, as Special Master in the amount of $3,043.38, and Edward A. Doerr, a Special Master in the amount of $3,645.56, is assessed against and to be paid by the plaintiffs and defendants equally; the

compensation of Wayne G. Cook was initially ordered to be advanced by defendants, but subject to final order of this Court; the fees and disbursements of both Special Masters shall be taxed one-half against plaintiffs and one-half against defendants, and defendants shall be credited for all advancements heretofore made; the fees and disbursements of Edward A. Doerr shall be paid within thirty days of entry of this judgment; upon failure of either party to make such payment within the time allowed, the Clerk shall forthwith issue a writ of execution in favor of the Special Master, and against the [delinquint] party or parties; all other costs in the amount of $..... are taxed against plaintiffs, severally, Riley, J. (Ent. 3 OJ 119) (Notice to attys. by mailing copies of Memorandum of Decision and Order for Judgment to all plaintiffs, and to all attorneys of record for plaintiffs and defendants and copy mailed to Special Master)

Feb. 16, Filed Notice of Appeal of First Iowa Hydro Electric Cooperative, F. A. E. Gilbmor, Harry J. Strong, and Harry Imel from Judgment entered on January 25, 1956. Copies of Notice of Appeal mailed to X. C. Nady, First National Bank Bldg., Tipton, Iowa; James R. McManus, 417 Fleming Bldg., Des Moines, Iowa; James D. France, First National Bank Bldg., Tipton, Iowa; Larned A. Waterman, 717 Davenport Bank Bldg., Davenport, Iowa; Howard A. Steele, 510 Central National Bank Bldg., Des Moines, Iowa; Parrish, Guthrie, Colflesh & O'Brien, 902 Register &
[fol. 199] Tribune Bldg., Des Moines, Iowa; Robert W. Bergstrom, 327 So. LaSalle St., Chicago, Illinois; Robert H. Walker, 609 Blondeau St., Keokuk, Iowa; Earl Smith, 609 First National Bldg., Mason City, Iowa; T. M. Ingersoll, 1120 Merchants National Bank Bldg., Cedar Rapids, Iowa, Byron L. Sifford, 750 Orpheum Electric Bldg., Sioux City, Iowa; Frederic M. Miller, 400 Empire Bldg., Des Moines, Iowa and Edward A. Doerr, 931

Davenport Bank Bldg., Davenport, Iowa, this 16th day of February, 1956, E. E. Poston, Clerk, By /s/ Erna Hoefer, Deputy Clerk.

Mar. 19, Filed Designation of Contents of Record on Appeal filed by appellants, First Iowa Hydro Electric Cooperative, F. A. E. Gillmor, Harry J. Strong and Harry Imel.

List of Pleadings* and Orders Attached Hereto Which are to be Printed.

1954

1. Feb. 18, Complaint.

1955

2. May 23, Order Appointing Special Master.

3. June 4, Memorandum Order Denying Plaintiffs' Motion to Assess Attorney Fees.

4. July 30, Order Re Discovery Depositions of Harry J. Strong.

5. Aug. 29, Notice of Entry of Appearance of Robert M. Bell and Bell, Farrar & Scott as Attorneys for Plaintiffs.

6. Aug. 31, Motion to Quash Appearance.

7. Sept. 2, Petition to Intervene on Rule to Show Cause on the Motion of Attorneys Erance, France & Nady, James R. McManus and Allan R. Shepherd to Quash the Entry of Appearance of the Law Firm of Bell, Farrar & Scott.

8. Sept. 8, Motion.

* In each case dates used are those on which the pleading was filed.

[fol. 200]

8A. Sept. 6, Order on Withdrawal of Appearance.

9. Sept. 16, Motion for Leave to Remove France, France & Nady, James R. McManus and

		Allan R. Shepherd as Attorneys for Plaintiffs Herein.
10.	Sept. 21,	Order Accepting Registration of Wayne G. Cook as Special Master.
11.	Sept. 21,	Order appointing Special Master.
12.	Sept. 26,	Motion to Defer Deposit of Funds.
13.	Sept. 27,	Order Denying Motion to Defer Requirements of Deposit.
13A.	Sept. 29,	Order.
14.	Sept. 29,	Resistance to Motion to Remove Attorneys and Application by Attorneys for Affirmative Relief.
15.	Sept. 30,	Motion for Leave to Intervene.
16.	Oct. 5,	Order (overruling Motion for Leave to Remove Attorneys).
17.	Oct. 5,	Opinion.
18.	Oct. 5,	Order (permitting plaintiffs to submit written statements on Motion to Intervene filed by Gooder, et al.).
19.	Oct. 6,	Order (U. S. Court of Appeals Case No. 15436).
19A.	Oct. 10,	Affidavit of Prejudice.
20.	Oct. 11,	Motions to Dismiss.
21.	Oct. 11,	Amendment to Order.
22.	Oct. 17,	Motion to [Exponge] From the Record Order Dated Oct. 5, 1955.
23.	Oct. 17,	Resistance to Defendants' Motion to Dismiss and Application by Plaintiffs for Affirmative Relief.
24.	Oct. 21,	Ruling and Order on Affidavit of Prejudice.
25.	Oct. 28,	Order.

26. Nov. 9, Order for the Payment of Fees to Special Master, Wayne G. Cook.

27. Nov. 21, Order.

28. Dec. 2, Order.

29. Dec. 22, Order.

[fol. 201] 1956

30. Jan. 3, Petition for Review.

31. Jan. 4, Report of Special Master.

32. Jan. 10, Motion to Dismiss.

33. Jan. 16, Order.

34. Jan. 17, Supplemental Report of Special Master.

35. Jan. 19, Exceptions and Objections to Report of Special Master.

36. Jan. 19, Petition for Review.

37. Jan. 19, Motion to Vacate Order Appointing Special Master.

38. Jan. 25, Memorandum of Decision and Order for Judgment.

39. Jan. 25, Judgment.

40. Feb. 16, Notice of Appeal.

41. Mar. 19, Designation of Content of Records on Appeal.

LIBRARY
SUPREME COURT, U. S.

United States Court of Appeals

FOR THE EIGHTH CIRCUIT

No. 14,858

CIVIL

FIRST IOWA HYDRO-ELECTRIC COOPERATIVE, P. A. E. DILLMAN, HARRY J. HYDRO, AND HARRY HOSS, APPELLANTS,

vs.

IOWA-ILLINOIS GAS AND ELECTRIC COMPANY, IOWA POWER AND LIGHT COMPANY, IOWA SOUTHERN UTILITIES COMPANY, INTERSTATE POWER COMPANY, UNION ELECTRIC POWER COMPANY, KANSAS CITY POWER AND LIGHT COMPANY, IOWA ELECTRIC LIGHT AND POWER COMPANY, NORTHWEST LIGHT AND POWER COMPANY, IOWA PUBLIC SERVICE COMPANY AND IOWA UTILITIES ASSOCIATION, APPELLEES.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF IOWA

FILED

JAN 12 1957

E. E. KOCH
CLERK

United States Court of Appeals

FOR THE EIGHTH CIRCUIT

No. 15,548

CIVIL.

FIRST IOWA HYDRO ELECTRIC COOPERATIVE, F. A. E. GILLMOR, HARRY J. STRONG, AND HARRY IMEL, APPELLANTS,

VS.

IOWA-ILLINOIS GAS AND ELECTRIC COMPANY, IOWA POWER AND LIGHT COMPANY, IOWA SOUTHERN UTILITIES COMPANY, INTERSTATE POWER COMPANY, UNION ELECTRIC POWER COMPANY, KANSAS CITY POWER AND LIGHT COMPANY, IOWA ELECTRIC LIGHT AND POWER COMPANY, NORTHWEST LIGHT AND POWER COMPANY, IOWA PUBLIC SERVICE COMPANY AND IOWA UTILITIES ASSOCIATION, APPELLEES.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF IOWA

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CHRONOLOGICAL INDEX — SUPPLEMENTAL RECORD

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The record filed herein by Appellants omits material and relevant portions of the proceedings as shown by the docket entries in the office of the Clerk of the District Court in this cause and the Appellants' record also omits much material and relevant portions of the testimony in various and numerous hearings. For the convenience of the Court this Supplemental Record sets forth in chronological order the material and relevant pleadings and documents filed in the office of the Clerk of the District Court as well as abstracts of testimony given at various hearings. Where the documents or papers filed in the office of the Clerk have been reproduced in Appellants' record, reference thereto will be indicated by (R.....).

February 18, 1954

Filed Complaint (R. 15).

March 10, 1954

Filed notice of defendant Union Electric Power Co. to take depositions of all plaintiffs and others upon oral examination.*

March 15, 1954

Filed notice and proof of service of interrogatories and interrogatories propounded to plaintiffs by defendants other than Union Electric Power Company.**

(There were numerous interrogatories propounded and answered, of which interrogatories 1, 2(b), 3 and 4(c), and the answers thereto, which were filed April 14, 1954, are reproduced as follows, to-wit:)

Interrogatory 1. State whether plaintiff First Iowa Hydro Electric Cooperative claims that all of the damages alleged in paragraph 18 of the Complaint accrued to it in its capacity as a cooperative; and if said plaintiff claims that only a portion of said damages accrued to it and that the remaining portion

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*The docket entries have been abbreviated.

**Wherever defendants are referred to herein, it includes all defendants except the Wisconsin Power and Light Co., which company was never served and did not appear.

accrued to the other plaintiffs individually and not as members of said cooperative state the amount of said damages which said plaintiff claims as accruing to it.

Answer to Interrogatory 1. Yes.

Interrogatory 2(b). The amount in money, if any, which said plaintiff claims on account of loss of profits to the individual plaintiffs in their individual business.

Answer to Interrogatory 2(b). No claim for past loss to plaintiffs' individual personal businesses.

Interrogatory 3. Set forth a balance sheet showing, by description and by dollar amount, the amount and nature of the financing of plaintiff contemplated by paragraph 12 of the Complaint, and the assets, by description and dollar amount, which would be the basis of such financing. Itemize by year any changes in said statement from June 10, 1938 through the present date.

Answer to Interrogatory 3. $60,000,000 in 40 year 4% bonds planned, secured by Moscow Dam Project valued at $32,084,000, Rochester Dam Project valued at $18,008,000 and transmission system valued at $5,870,000. For further information see Charles T. Main, Inc., reports above mentioned.

Interrogatory 4(c). State, as to each change of membership in plaintiff, whether the new member paid any consideration for his membership, and if so, the amount of said payment, the date of said payment, and to whom it was paid.

Answer to Interrogatory 4(c). Each member, on joining, paid to the treasurer the sum of $2.00 as provided for in the articles of incorporation.

March 17, 1954

Filed notice and proof of service of motion by defendants other than Union Electric Power Company for the production of documents for inspection and copying.

March 30, 1954

(Abstract of proceedings before Riley, J., regarding defendants' notice of depositions and motion for production of documents, and plaintiffs' motion to vacate and quash notice of depositions and motion to enlarge time to answer and to object to interrogatories. All parties represented by attorneys of record. Excerpts of Court's statements in open court:

"The charges are very general in the complaint. To use a hunting term, I think counsel for the plaintiffs are hunting with a shotgun and they object because counsel for defendants want to use a rifle, and I think counsel for defendants are entitled to use a rifle, and they are entitled to find out against what the shotgun is being pointed. * * * * They have a very serious charge against them made in very general terms. Under the old rule we would be in here with a plethora of motions for more specific, more definite statements, and to strike, and everything else. Those we will waste little time on because the discovery proceedings are designed to permit the very thing that is being undertaken here. * * *" (Tr. 16-19)

"The complaint as I understand charges the defendants jointly and severally, but the allegations of the complaint are general and apply equally to all defendants. There are 11 defendants. I wouldn't want the plaintiffs to be harassed by 11 separate attempts to interrogate each one of the separate plaintiffs by the taking of depositions, and they shouldn't be subject either to the annoyance or the expense of anything of that kind, so that that is another matter in which it would seem to me it is desirable that all counsel sit down and try to figure out and agree upon how the matter will be handled and depositions taken in an orderly way.

"Now, I do believe that if these plaintiffs present themselves for depositions at the request in this instance of Mr. Walker's client, the Union Electric Power Company, with notice to all other defendants it ought to provide an opportunity for them to come in and separately without tying themselves into his defense at all eliciting the information they are seeking. Otherwise we would subject them to the hazard if eleven separate depositions at eleven separate

places necessitated the employment and presence of their counsel, and there are five plaintiffs other than the Co-operative, and each of them separately—that would be interminable." (Tr. 22-23)

April 3, 1954

Filed and entered order overruling plaintiffs' motion to vacate notice of taking depositions; and overruling plaintiffs' objections to an order for the production of documents; and that plaintiffs' motion to enlarge the time in which to answer interrogatories are sustained; plaintiffs given fifteen (15) days additional time to answer or object, Riley, J.

April 21, 1954

Filed stipulation. (The following stipulation was executed by all parties.)

It is stipulated by and between plaintiffs and defendants as follows:

1. Plaintiffs shall produce the documents as provided in defendants' motion for production at the United States District Attorney's Office in the Federal Court House, Davenport, Iowa, within five days after the pending interrogatories have been fully answered by plaintiff First Iowa Hydro Electric Cooperative pursuant to any order of the Court.

2. Depositions of Union Electric Power Company shall commence thirty days after the completion of the production of documents by plaintiffs.

3. The depositions requested by Union Electric Power Company shall commence in one of the court rooms of the Scott County, Iowa, District Court House, Davenport, Iowa, or at such other place as may be hereafter agreed upon by the parties, or as required by the Federal Rules of Civil Procedure. Such depositions shall commence at 1:30 P.M. on the thirtieth day following the completion of the production of documents by the plaintiffs, or the first judicial day thereafter.

4. Defendants shall enter an appearance at the depositions requested by Union Electric Power Company.

5. Defendants shall move or plead to the complaint within twenty-five (25) days after the completion of the depositions requested by Union Electric Power Company.

6. No depositions or other discovery procedure shall be initiated by any party, plaintiffs or defendants, until the depositions requested by Union Electric Power Company have been completed.

DATED: April 1, 1954.

April 30, 1954

Filed and entered order that certain defendants shall plead to complaint within twenty-five (25) days after completion of depositions requested by Union Electric; that stipulation filed April 21, 1954, is approved; and that proposed order on defendants' motion for production of documents filed March 17, 1954, is entered, subject to time and place of production as provided in stipulation, Riley, J.

May 19, 1954

Filed defendants' motion to strike answers to interrogatories as filed, and to require proper and complete answers thereto.

June 8, 1954

Filed resistance by plaintiffs to motion to strike answers to interrogatories and proof of service.

July 9, 1954

Filed memorandum and order relating to objections and answers to interrogatories, Riley, J. (Said order and excerpts from the memorandum are set out below.)

Generally, the use of discovery methods follows the closing of the pleadings, when the issues have become clear. In this case different defendants gave notice before answer of proceedings under Rules 26, 33 and 34 and elicited motions by plaintiffs to vacate the notices and to enlarge the time period.

It appeared at the time of hearing on the motions at Davenport (inserted during our regular term there) and from the necessarily cursory examination then permitted, that the request of defendants to be allowed discovery before answer, though unusual, was not unreasonable because of the grave nature of the plaintiffs' claim. Accordingly, plaintiff's request for time to answer interrogatories and make objection was granted by a liberal allowance.

* * * * * * * * * * *

An examination of the interrogatories and of the scope and detail thereof, of plaintiff's answers and objections to those unanswered, and of defendants' motion to strike answers filed and to require other answers more responsive, suggest and confirm that the court's prior order, permitting the parties so to proceed before answer, was ill-advised.

* * * * * * * * * * *

It is true these same interrogatories by the defendants were on file when the order of April 3, 1954, was made and when counsel stipulated following the court's request, but the answers and conflicting objections and motions confirm the court's belief that to proceed to rule on the questions thus presented, with a likely consequence of more alleged unresponsive answers and resulting objections and motions, may serve not only to defeat the purpose of Rule 33 but also of the Rules themselves, which are designed to secure the just, speedy and inexpensive determination of the action.

* * * * * * * * * * *

The court has examined all of the pleadings relating to the interrogatories and the briefs and answering briefs of counsel, and is aware of the industry of counsel which they reveal. However, the court is persuaded that the use and application of Rule 33 may be more effective in this case if we seek not just to follow the precedents cited, though they are numerous and respected, but rather to effectuate the purpose declared at the hearing on March 30, 1954, at Davenport. That will require a measure of cooperation among all counsel which so far is not conspicuously manifested. An example is provided by reference to defendants' interrogatory No. 14, (a) to (j) inclusive, and the nine interrogatories following, and to plain-

tiff's answers and objections, and to defendants' motions and objections to the answers made.

I am now convinced that it will enable the court better to serve the ends of justice to revoke all of the previous orders, commencing with that of April 3, 1954, concerning these discovery proceedings and the filing of an answer, to disapprove the stipulation of April 21, 1954, by counsel, and to direct the defendants and each of them to plead to plaintiffs' complaint, and as soon as the pleadings are closed and the issues joined, to proceed with the production of documents and to the taking of depositions under Rule 26, now postponed by order of court. If a time and place cannot be agreed upon by stipulation, the court will fix the same by order.

* * * * * * * * * * *

Order

Upon consideration of the motions filed herein on behalf of both plaintiffs and defendants with respect to interrogatories proposed herein by the parties prior to any answer or the cause being at issue, the court finds pursuant to its memorandum hereinabove, and,

It Is Ordered that: a) plaintiff's objections to defendants' interrogatories be and the same are hereby sustained; b) defendants' objections to plaintiff's purported oath and signatures are sustained, and plaintiff is allowed ten (10) days from the filing of this order to make and file a written oath to the effect that Harry J. Strong or H. J. Strong (as he may sign) is secretary-treasurer of plaintiff First Iowa Hydro Electric Cooperative, that the answers to interrogatories filed herein on April 14, 1954, to which his signature is attached, were made by him in his capacity as such officer for and on behalf of plaintiff, and that in making such answers he consulted and relied upon his own knowledge, upon the files and records of the plaintiff and upon information provided by officers and directors of plaintiff, and that said answers are true and correct; failing this, plaintiff will be subject to sanctions to be imposed under Rule 37; and c) defendants' objections to plaintiff's answers and their motions to strike the answers, be and the same are hereby overruled. These rulings are without prejudice to defendants' right to seek to develop or obtain by deposition the information sought by the interrogatories.

It Is Further Ordered that the previous orders, commencing with that of April 3, 1954, concerning discovery proceedings herein and times to plead, be and they are hereby vacated; that the stipulation of counsel of April 21, 1954, as to discovery and time to plead, be and the same is disapproved and defendants and each of them are directed within twenty (20) days from the entry of this order to plead to plaintiffs' complaint.

July 28, 1954

Filed answer of defendant Iowa Electric Light and Power Company and Northwestern Light and Power Company. (By July 29, 1954, all defendants had answered. While differing in some particulars the answers of all defendants were substantially the same as that of Iowa Electric Light and Power Company and Northwestern Light and Power Company which is set out below.)

Comes now the defendant Iowa Electric Light and Power Company (designated in the complaint as Iowa Electric Light & Power Co.) and the defendant Northwestern Light and Power Company (designated in the complaint as Northwest Light and Power Co.) and for answer to the complaint herein states as follows:

FIRST DEFENSE

The complaint fails to state a claim against these defendants of which this court has jurisdiction, and said complaint wholly fails to state facts showing that the claim of the plaintiffs is one of which this court has jurisdiction under the Sherman or Clayton Anti-Trust Acts.

SECOND DEFENSE

The complaint fails to state a claim against these defendants or either of them upon which relief can be granted.

THIRD DEFENSE

The complaint fails to state a claim or cause of action against these defendants or either of them in that:

1. Said complaint wholly fails to allege that the plaintiff corporation or the individual plaintiffs had an intent and preparedness to engage in the business referred to in the complaint, or that plaintiff corporation or the individual plaintiffs could have engaged in business as alleged in the complaint, independent of any act or conduct of these defendants, in that among other things:

(a) Said complaint wholly fails to allege that the plaintiff corporation or any of the individual plaintiffs have complied with the laws of the State of Iowa applicable to said proposed project and the financing thereof, the compliance therewith being a necessary requirement and a condition precedent to the plaintiffs engaging in business or in the building, constructing or financing of the proposed project referred to in plaintiffs' complaint, and that among the laws of the State of Iowa as to which plaintiffs fail to show compliance as a prerequisite and condition precedent to the construction of said project referred to in plaintiffs' complaint and the financing thereof, if said project be deemed a business, are chapters of the 1954 Code of Iowa as follows: Chapter 402; Chapter 499; Chapter 469A; Chapter 469, and Chapter 489.

(b) The complaint wholly fails to allege that plaintiffs ever had been authorized or are now authorized to do business in the States of Wisconsin, Illinois or Missouri, and said complaint also wholly fails to allege that the plaintiffs have complied, as conditions precedent, with the laws of said states with reference to the procurement of necessary franchises and permits and authority for the construction or maintenance of transmission lines or the distribution of electric power and light in the States of Wisconsin, Illinois and Missouri, and said complaint wholly fails to allege facts showing preparedness to engage in interstate commerce.

(c) The complaint wholly fails to allege that the plaintiffs have complied with the conditions annexed to and forming a part of the Federal license of the Federal Power Commission, being License No. 1853, and with other applicable provisions of the Federal Power Act, Title 16, U.S.C.A., Section 791, et seq., and the regulations issued thereunder.

2. None of the plaintiffs is a "person * * * injured in his business or property by reason of anything forbidden in

the antitrust laws" within the meaning of Section 4 of the Clayton Act, Title 15, U.S.C.A., Section 15, and this action will not lie in that:

(a) The complaint fails to allege that plaintiffs had any business or property subject to damage.

(b) It appears from the complaint that plaintiff corporation is a co-operative association allegedly organized and existing under and pursuant to the provisions of Chapter 499, Code of Iowa 1954 (Chapter 390 G (1) of the 1935 Code of Iowa), and that said complaint wholly fails to allege facts which would warrant recovery of any damage resulting from any of the acts charged against these defendants which could or would be the property of plaintiff corporation or the individual plaintiffs.

(c) Such damages, if any, that may have resulted from any of the acts charged against these defendants are not the property of either the plaintiff corporation or the individual plaintiffs, but under the provisions of Chapter 499, Code of Iowa 1954, would only result or inure to the benefit of users and consumers of the products or services of said corporation.

(d) Plaintiff corporation is a co-operative association allegedly organized and existing under and pursuant to the provisions of Chapter 499, Code of Iowa 1954, but has never engaged in business as a co-operative and has no members within the limitations of Section 499.13, which provides, in part, as follows:

> "Individuals may be eligible (to membership) only if they are engaged in producing products marketed by the association, or if they customarily consume and use the supplies or commodities it handles, or use the services it renders."

(e) The plaintiffs lack the capacity to sue and have neither the authority to maintain this action nor the right to recover in that the corporate plaintiff, as a co-operative association organized under and subject to the laws of the State of Iowa, cannot recover damages, profits or earnings for its own benefit, and the individual plaintiffs, having no business or property which has been injured, and admittedly seeking

no damages, cannot sue for themselves or for the benefit of unknown and prospective members of the corporate plaintiff and any unknown and prospective users and consumers of the products or services of the corporate plaintiff.

(f) The individual plaintiffs are not entitled to maintain this action either on behalf of themselves individually or as a derivative action on behalf of the plaintiff corporation, and the complaint wholly fails to allege conditions precedent to the maintenance of a derivative suit on behalf of the corporation and wholly fails to assert any claim or right to relief on behalf of the individual plaintiffs.

FOURTH DEFENSE

These defendants state that plaintiff corporation exists as a corporation solely and alone by reason of the laws of the sovereign State of Iowa under and pursuant to the provisions of Chapter 499, Code of Iowa 1954, and that said corporation, existing and created under and pursuant to the laws of the State of Iowa, is limited in its rights and powers by all other laws of the State of Iowa and plaintiff corporation has no power or authority to engage in any business or activity without complying with Iowa law and has no power to engage in any business activity which would be contrary and in violation of Iowa law, and the mere fact, if it be a fact, that the Federal Power Commission has granted to the plaintiff corporation a permit to engage in the activity therein provided does not thereby vest plaintiff corporation with any power which it would not otherwise have under Iowa law, and plaintiff corporation accordingly has no corporate power or authority to do or engage in any of the types of activity as to which permits from the State of Iowa are required pursuant to Iowa law, including those provisions of Iowa law referred to in the Third Defense herein which are incorporated herein by reference, and to the extent, if any, that the Federal Power Act, Title 16, U.S.C.A., Section 791, et seq., by its provisions or as construed and applied, purports to invest and confer upon plaintiff corporation power or authority beyond the corporate power or authority authorized by the State of Iowa, the said Federal Power Act is in violation of the Constitution of the United States and particularly the Tenth Amendment thereof.

FIFTH DEFENSE

By way of further answer to said complaint these defendants state:

1. With regard to any alleged cause of action by plaintiffs against these defendants under the Sherman or Clayton Anti-Trust Acts, recovery of damages or other relief is limited to the period prescribed by the applicable statute of limitations of the State of Iowa, to-wit, two years prior to the filing of said complaint under Section 614.1(3), Code of Iowa 1954, and all causes of action for which plaintiffs seek relief in said complaint accruing prior to that time, and all damages sustained by plaintiffs prior to that time, for which recovery is sought in the complaint, are barred.

2. In the alternative to paragraph 1 of this defense, recovery of such damages or other relief is limited to the period of five years prior to the filing of said complaint under Section 614.1(5), Code of Iowa, 1954, and all causes of action for which plaintiffs seek relief in said complaint accruing prior to that time, and all damages sustained by plaintiffs prior to that time, for which recovery is sought in the complaint, are barred.

SIXTH DEFENSE

The five (5) individual plaintiffs under the guise of an alleged co-operative association are seeking their personal and individual enrichment, and to permit said individual plaintiffs to recover damages in the sum of One Hundred Twenty Million Dollars ($120,000,000) or in any amount, would constitute an unjust enrichment of said individual plaintiffs. The plaintiff corporation, being organized and existing under and by virtue of Chapter 499, Code of Iowa 1954 (Chapter 390G (1) of the 1935 Code of Iowa) is not and has never become such a co-operative corporation to be entitled to bring or maintain this action. To permit either plaintiff corporation or its five (5) individual plaintiff members thereof to recover from these defendants or either of them damages in the sum of One Hundred Twenty Million Dollars ($120,000,000) or in any amount would be an unjust enrichment and contrary to the laws and public policy of the State of Iowa authorizing the creation of such corporations for limited co-operative purposes. To permit recovery herein would be contrary to and beyond the

contemplation of the Sherman Act and the Clayton Act and the public policy of the State of Iowa and of the United States.

SEVENTH DEFENSE

By way of further answer to said complaint these defendants state:

1. Plaintiffs are barred by reason of laches from maintaining this action.

EIGHTH DEFENSE

For further answer to plaintiffs' complaint, these defendants state:

1. Answering paragraph 1 these defendants admit that this court has jurisdiction of actions brought under the Sherman or Clayton Anti-Trust Acts, and that the jurisdiction of this court is invoked under those Acts. However, these defendants deny that this controversy in fact involves any violation of said Acts, or that the complaint sets forth a violation of said Acts as to these defendants, or that these defendants have violated said Acts, and this court has no jurisdiction of the alleged controversy between plaintiffs and these defendants.

2. Answering paragraphs 2, 8, 9 and 12, these defendants state that they or neither of them have sufficient information to form a belief as to the truth of the allegations in said paragraphs, and, therefore, deny the same and demand strict proof thereof.

3. Answering paragraph 3, these defendants admit that on or about September 8, 1948, the Federal Power Commission issued Project License No. 1853 to plaintiff corporation, but as to how long or whether or not the same is in full force and effect these defendants do not have sufficient information to form a belief and therefore deny the same and demand strict proof thereof. These defendants deny each and every other allegation of said paragraph contained, and specifically deny that plaintiff corporation was ever permitted or authorized to construct the project. These defendants deny that plaintiffs had an intent and preparedness to engage in business and plaintiffs have wholly failed to comply with and to have the

requisite authority to proceed with said alleged project under the laws of the State of Iowa, including Chapter 502, Code of Iowa 1954; Chapter 499, Code of Iowa 1954; Chapter 469A, Code of Iowa 1954; Chapter 469, Code of Iowa 1954; and Chapter 489, Code of Iowa 1954. Plaintiffs have also wholly failed to comply with and to have the requisite authority to proceed under the requisite statutes of the States of Wisconsin, Illinois and Missouri, with reference to qualifying as a foreign corporation to do business in said states or to comply with the laws of said states governing the sale or distribution of electricity and the construction and operation of transmission lines and related activities, and plaintiffs have failed to comply with and to have the requisite authority to proceed under the statutes of the United States, including Title 16, U.S.C.A., Section 791, et seq., and particularly Sections 802(a) and 806 thereof. These defendants further deny that plaintiff corporation had any corporate power or authority to engage in or undertake the construction of said project without complying with Iowa law.

4. Answering paragraph 4, defendant Iowa Electric Light and Power Company admits that it is an Iowa corporation and that its principal place of business is in Cedar Rapids, Iowa, and defendant Northwestern Light and Power Company admits that it is a Delaware Corporation with a principal place of business in Cedar Rapids, Iowa. These defendants further admit that the defendant Iowa Utilities Association is an unincorporated voluntary association of which these defendants are members. These defendants deny each and every other allegation of paragraph 4 not hereinbefore admitted or otherwise pled to, and these defendants further state that there are other members of said Iowa Utilities Association who are not parties to this suit. Further answering these defendants state that as a matter of law this action is not properly brought against said Association by reason of the fact that the relief sought is actually sought against the corporate defendants, parties hereto, and that said Association is not a proper party defendant.

5. Answering paragraph 5, the defendant Iowa Electric Light and Power Company admits that it sells and distributes electric light and power in the State of Iowa. Defendant Northwestern Light and Power Company admits that at and

prior to the commencement of this suit it sold and distributed electric light and power in Iowa but that at the time of the filing of this answer it is no longer so doing. These defendants admit that they are members of the Iowa Utilities Association and that the office of said association is in Des Moines, Iowa. Further answering, these defendants deny each and all of the other allegations in paragraph 5 not hereinbefore admitted and these defendants further state that said association is merely a trade association for the purpose of education and dissemination and exchange of information as to the utility business, and that it has no control or power over these defendants or any of its members.

6. Answering paragraph 6, these defendants deny that they are liable, either jointly or severally, to plaintiffs in this cause or that plaintiffs are entitled to any relief against them or either of them, either severally or jointly with other defendants.

7. Answering paragraph 7, defendant Iowa Electric Light and Power Company admits that it sells and distributes electric light and power in the State of Iowa only, and defendant Northwestern Light and Power Company admits that it sold and distributed electric light and power within the State of Iowa at and prior to the time of commencement of this suit, but at the time of filing this answer it is no longer engaged in the selling or distributing of electric light and power. Iowa Electric Light and Power Company further states that it has never sold nor distributed electric light and power other than in the State of Iowa, and Northwestern Light and Power Company alleges that for a short period of time it had a few miles of electric transmission lines in the State of Minnesota, but that it has not sold nor distributed electric light and power other than in the State of Iowa since on or about the year 1935. These defendants further state that neither of them now or at any time have ever controlled the business of any other defendant herein, and that no other defendant herein has ever controlled the business of these defendants, and these defendants deny each and every other allegation of said paragraph 7.

8. These defendants deny the allegations of paragraphs 10, 13, 14, 15, 16, 17 and 18. Further answering, these defendants specifically deny that any act of either of these defendants was the proximate cause of the damages, if any, allegedly

sustained by plaintiffs, and plaintiffs, therefore, were not injured in their business or property, if any they had, by reason of anything forbidden or declared to be unlawful by the anti-trust laws. These defendants further specifically deny that said project of plaintiffs was feasible, doable and economically sound, and state that the failure of the plaintiffs to finance said project was not occasioned or brought about by any act or conduct of these defendants. These defendants further state that the project, as proposed by plaintiffs, was opposed by the sovereign State of Iowa and by numerous other parties, not parties to this suit nor alleged by plaintiffs to be parties to any conspiracy.

9. Answering paragraph 11, these defendants admit that the period of time covered by said complaint purports to begin in the year 1938, but state that they have no knowledge or information sufficient to form a belief as to when the other matters alleged in said complaint are claimed by plaintiffs to have occurred, and, therefore, deny that the said period of time covered by said complaint continued through the years up to and including the date on which said complaint was filed, and these defendants further state that causes of action accrued and damages sustained by plaintiffs, if any, more than two (2) years prior to the filing of said complaint, or in the alternative more than five (5) years prior to such filing are barred by Section 614.1(3) or by Section 614.1(5), Code of Iowa 1954, or by laches, as alleged in the Fifth and Seventh Defenses of this answer.

10. These defendants deny each and every allegation of the complaint not hereinbefore expressly admitted.

WHEREFORE, having fully answered the complaint herein these defendants pray that judgment issue for these defendants against the plaintiffs, together with their costs.

March 4, 1955

Filed application of answering defendants for an order relating to production of documents and records for inspection and copying, together with notice of application and certificate of service.

March 8, 1955

Filed order for the production of documents and records for inspection and copying by defendants, Riley, J.

April 13, 1955

Filed motion of defendant Union Electric Power Company for time, place and circumstances of taking depositions with proof of service. (Said motion is set out below:)

Comes now Union Electric Power Company, one of the defendants in the above entitled matter, and moves the court to order a time, place and circumstances for taking of the depositions of Harry J. Strong, F. A. E. Gillmor, Carl J. Mitzner, Harry Imel, P. H. Naber, J. W. DuBois, Ray Norris and J. M. Roth, which said parties were heretofore notified of the desire of this defendant to take depositions in accordance with Rule 26(a), and in support of said motion, this defendant states:

(1) In accordance with the understanding with counsel in connection with the taking of said depositions, attorneys for this defendant have made serious and continued efforts to enter into a stipulation with plaintiffs' counsel as to the time, place and circumstances for the taking of said depositions, which was in accordance with the desire of this court as expressed in previous orders.

(2) This defendant further states that plaintiffs' counsel has requested this defendant to proceed with its plans for depositions.

(3) This defendant states that because of difficulties encountered in connection with details of the taking of the depositions, it has made serious effort to arrive at a stipulation with plaintiffs' counsel concerning such details, and has in that connection contacted plaintiffs' counsel in an effort to arrive at a stipulation, but that notwithstanding such contacts, which have been made by letter and by telephone, plaintiffs' counsel has not answered this defendant's inquiries.

(4) This defendant further states that the difficulties that have now arisen in connection with the taking of the deposition are as follows:

(a) Since the Scott County Courthouse is being demolished and the State Courts in Scott County are using the Federal Building, it is not possible for the depositions to be taken in either one of those two locations and another place for the taking of the depositions must be found. In that connection, this defendant has obtained available space in the Davenport Bank Building which will be satisfactory for the purpose.

(b) A date must be set upon which the depositions are to commence and the manner in which they shall progress must be decided.

(c) The hours of the day and the days of the week during which the depositions shall continue must be decided. In that connection, since the depositions will take a considerable period of time, and the defendants wish to obtain daily transcripts of the evidence taken, defendant has suggested that the hours of the taking of the deposition be from 9 o'clock a.m. without interruption except for rest periods until 1 o'clock p.m., and that the days of the week will be Mondays through Fridays.

(d) The matter of the officers before whom the depositions are to be taken must be settled. In that connection, this defendant has ascertained that the Scott County Reporters do not have sufficient staff to take the depositions in question and produce daily copy. For that reason, this defendant has considered the employment of the reporting firm of Eulass & Company of Chicago. Under Rule 28(a) the court may appoint one of the members of this reporting firm or some other party as the officer before whom the deposition should be taken. The defendant is desirous of using the services of the local court reporters as far as possible and Mr. David J. Hess of Davenport would be available to act as an officer for the taking of depositions, provided it was not necessary for him to comply with Rule 30(c) by being present during the recording of all of the testimony of the witnesses. If it is the judgment of the court that Rule 30(c) with respect to the presence of the officer is essential, then the court could appoint Mr. Michael T. Organ, sole owner of the Eulass & Company reporting company of Chicago to act as the officer in accordance with Rule 28(a).

(e) A dispute has arisen as to whether or not plaintiffs will be required to produce all of the documents at the deposition that were previously produced in the office of the Clerk

of this court in accordance with the prior order of this court and the prior stipulations of counsel. In this connection, defendant has endeavored to agree with the plaintiff that photostatic copies of the original documents may be marked in evidence as to identification at the taking of the deposition in preference to the production of the original documents themselves, but plaintiffs have indicated that the original documents will not be produced without a subpoena and that they would not be agreeable to the introduction of photostatic copies. Defendant had suggested photostatic copies for the convenience of the plaintiff in that the defendant would have no objection to the introduction of the originals.

* * * * * * * * * * *

WHEREFORE, defendant Union Electric Power Company moves the court to enter an order providing for the following matters:

(1) The time as to day and date that these depositions shall start.

(2) The place where the depositions shall be taken.

(3) The hours of the day during which the deposition shall be taken.

(4) The days in the week during which the deposition shall be taken.

(5) The officer before whom the deposition shall be taken.

(6) The documents that will be produced by the plaintiffs.

(7) The issuance of subpoenaes by the Clerk of this court to the witnesses requiring their attendance at the deposition.

(8) An order to the Clerk of this court directing him to issue a subpoena duces tecum to all of the plaintiffs herein for the production of all documents in their possession pertaining to this cause of action, and specifically, but not limiting the general, all documents heretofore produced by the said plaintiffs.

(9) The identification and introduction of the original documents as evidence at the taking of the depositions unless the plaintiffs stipulate with regard to the introduction of photostatic copies.

(10) That the deposition of the plaintiff Harry J. Strong shall be taken first and that upon the conclusion of the taking of the said Strong deposition, the time, place and circumstances of the taking of the depositions of the other witnesses shall be set by the further order of this court, upon the application of this defendant.

April 29, 1955

Filed motion of plaintiffs to require payment of expenses, praying as follows:

> "Wherefore, plaintiffs respectfully move the court that the defendant Union Electric Power Co., be not allowed to take the depositions of Harry J. Strong, F. A. E. Gillmor, Carl J. Mitzner, Harry Imel, P. H. Naber, Ray Norris and J. M. Roth, on oral examination at Davenport, Iowa, pursuant to the notice heretofore served by said Defendant Union Electric Power Co. unless said defendant advances to plaintiffs, or pays into the office of the clerk of this court the expense of attendance of two of plaintiffs' attorneys at such examination, including reasonable counsel fees, and that said defendant likewise pay additional sums for such expenses if it hereafter appears that said depositions may continue longer than now anticipated, or in the alternative that such depositions be taken only on written interrogatories."

May 10, 1955

Filed motion of defendant Interstate Power Company for order re depositions. (Said motion is set forth below.)

Comes now defendant, Interstate Power Company, (sometimes hereinafter called "Interstate"), by its attorneys, and moves the Court that the "Motion of Defendant Union Electric Power Company for Time, Place and Circumstances of Taking Depositions" be granted, adopts said motion and incorporates it by reference herein as also the motion of Interstate Power Company, and further moves that this Court order that at said depositions this defendant shall have the right to appear and cross-examine the witnesses called by defendant Union Electric Power Company.

In support of said motion defendant states as follows:

1. On February 13, 1954, plaintiffs filed this lawsuit, seeking a decree and a joint and several judgment against eleven defendants, including Interstate Power Company, in the amount of $120,000,000.00. This relief was sought on the basis of a vague and generalized complaint, which complaint has been characterized by this Court as follows:

> "Here is a very serious suit. As I understand it the complaint seeks $40,000,000 and treble damages. The charges are very general in the complaint. To use a hunting term, I think counsel for the plaintiffs are hunting with a shotgun . . . and I think counsel for defendants . . . are entitled to find out against what the shotgun is being pointed." (Official transcript, March 30, 1954, p. 15.)

2. From the date of service of summons upon it, defendant Interstate Power Company has sought adequate discovery from plaintiffs of whatever facts, if any, might support these vague charges, for two reasons: (a) to enable this defendant to prepare adequately for trial, and (b) to make it possible to prepare an adequate motion for summary judgment, and thus enable this defendant to avoid the expenses of a trial lasting several months. Reference to answer of plaintiff cooperative to interrogatory 17, filed April 14, 1954, shows that the only individual act of this defendant on which plaintiffs have thus far claimed to rely is a conversation alleged to have occurred in one telephone call made on behalf of plaintiffs to this defendant in February 1950. Interstate is therefore desirous of ascertaining all facts which have caused plaintiffs to file such a claim against it.

3. To achieve such adequate discovery, this defendant took the following steps:

(a) On March 12, 1954, together with a number of other defendants it propounded interrogatories to plaintiff cooperative, which interrogatories were filed March 15, 1954.

(b) On March 17, 1954, together with a number of other defendants, it filed a motion for the production of certain documents and records deemed relevant.

(c) On March 18, 1954, defendant Union Electric Power Company served the notice to take the depositions which are the subject of this motion. Under date of April 1, 1954, this defendant and others stipulated that they would enter their appearances at said depositions, and they have subsequently participated in proceedings to arrange and schedule said depositions, pursuant to the following expressed wishes of the Court:

> "Now, I do believe that if these plaintiffs present themselves for depositions at the request in this instance of Mr. Walker's client, the Union Electric Power Company, with notice to all other defendants it ought to provide an opportunity for them to come in and separately and without tying themselves into his defense at all eliciting the information they are seeking. Otherwise we would subject them to the hazard of eleven separate depositions at eleven separate places . . . ." (Official transcript, March 30, 1954, p. 23)

4. On April 14, 1954, plaintiff filed objections to a number of said interrogatories. Interstate and other defendants, deeming the majority of said answers evasive and unresponsive, filed a motion to strike said answers on May 19, 1954.

5. This Court, on July 9, 1954, sustained plaintiffs' objections to interrogatories and denied defendants' motion to strike the answers to certain interrogatories. This ruling was not on the merits of the respective interrogatories or answers, the Court stating instead that there existed "a situation which deprives the court in the present state of the record of the opportunity to do justly as between the parties by ruling on all the related objections and motions." (Opinion, July 9, 1954, p. 2.) The Court's ruling was instead based upon two procedural grounds, at least one of which is relevant to this motion:

(a) That said interrogatories were merely premature and that it was not necessary that the information which they requested be obtained prior to the filing of answers to the complaint. "The interrogatories, answers, objections and counter-objections go far beyond the objective of permitting the defendants to obtain information appropriate to answer." Opinion, July 9, 1954, pp. 1-2.)

(b) That the Court believed that the same information could be obtained in a less involved manner by the production

of documents and by the depositions which are the subject of this motion. The Court therefore directed the defendants, and each of them, "to proceed with the production of documents and to the taking of depositions under Rule 26, now postponed by order of court. If a time and place cannot be agreed upon by stipulation, the court will fix the same by order." (Opinion, July 9, 1954, p. 3.)

". . . . These rulings are without prejudice to defendants' right to seek to develop or obtain by deposition the information sought by the interrogatories. (Order, July 9, 1954, p. 4.)

6. Pursuant to the direction of the Court set forth in paragraph 5 above, certain defense counsel acting on behalf of all counsel for the defendants met with plaintiffs' attorneys on September 8, 1954 in Des Moines to discuss the production of documents by plaintiffs. Plaintiffs' attorneys agreed to produce the documents called for by the motion for production as soon as their then existing commitments would permit them to do so, which they stated they believed would not be later than September 27, 1954. This understanding was confirmed by letter to counsel for plaintiffs on September 10, 1954, and not contradicted by said counsel.

7. On December 9, 1954, no documents having yet been produced by plaintiffs, counsel for a defendant wrote counsel for plaintiffs requesting information as to the arrangements they had in mind for production.

8. Production of documents for inspection and copying at the office of the Deputy Clerk in Davenport was not commenced by plaintiffs until January 18, 1955. Subsequent to said date plaintiffs refused to produce all of the records called for by said motion for production. As a result of said refusal, on March 2, 1955, all answering defendants served upon counsel for plaintiffs an "Application of Answering Defendants for an Order Relating to Production of Documents and Records for Inspection and Copying," which application set forth the foregoing and other facts, together with notice that said application would be presented to the Court for hearing on March 8, 1955.

9. On March 8, 1955 this Court entered an order granting said application; and on said date plaintiff Harry J. Strong

orally agreed to produce the balance of said records by March 14, 1955. Additional records were in fact produced by him on said date.

10. At a preliminary pretrial conference on March 8, 1955, attended by counsel for plaintiff and defendants, Robert H. Walker, counsel for Union Electric Power Company, stated that Mr. McManus, of counsel for plaintiff, had requested that the scheduled depositions be deferred for approximately six weeks, until about April 25, 1955; that it was his understanding that the Court desired all defendants to participate in said depositions in lieu of convening separate depositions of the same witnesses; that counsel for defendants did not object to so setting the matter over; and that counsel for plaintiff was willing to produce said witnesses at about said time. Counsel for plaintiffs did not contest this statement.

11. Oral and written attempts by Mr. Walker to obtain a firm commitment from plaintiffs as to time and place of taking said depositions were crystallized in letters to counsel for plaintiffs on March 9, 1955 and March 25, 1955. Upon the failure of plaintiffs to cooperate in any way, there was filed on April 12, 1955 the "Motion of Defendant Union Electric Power Company for Time, Place and Circumstances of Taking Depositions," which motion and the affidavit attached thereto state the facts as to said failure of plaintiffs to cooperate.

12. Under date of April 25, 1955, plaintiffs served upon counsel for defendant Union Electric Power Company, but not upon the other defendants, a pleading denominated "Motion of Plaintiffs to Require Payment of Expenses," which seeks to suppress said depositions of the plaintiffs and in lieu thereof to substitute such written interrogatories as "defendant Union Electric Power Company may properly propound to said witnesses," unless the attorneys' fees and expenses of plaintiffs' counsel are paid in advance.

13. Such an effort to deny all discovery to Interstate and other defendants, and to deny discovery by oral deposition to Union Electric Power Company, should be denied for the following reasons:

(a) For one year, commencing with the stipulation of April 1, 1954, and continuing through all subsequent oral and writ-

ten communications, plaintiffs have allowed all defendants to believe that they would voluntarily appear for their depositions.

(b) Having filed a vague complaint containing serious charges, and having been permitted to avoid answering interrogatories relating to those charges on the ground that plaintiffs' depositions could more readily furnish said information, plaintiffs should not now attempt to lower an "iron curtain" against the method designated by the Court for the furnishing of this information.

(c) The fact that said depositions may proceed is now the law of the case, as embodied in the opinion and order of this Court dated July 9, 1954, and is binding upon plaintiffs.

(d) Under Rules 26 and 30 of the Federal Rules of Civil Procedure, defendants are entitled to the oral depositions of these party plaintiffs. They cannot make these serious charges and then wrap themselves in an iron curtain.

(e) The forum in which plaintiffs filed this cause was the Davenport division of the U. S. District Court for the Southern District of Iowa; and the first proposed witness is plaintiff Harry J. Strong, a resident of Davenport. To seek travel expenses and attorneys' fees for attendance in Davenport is therefore contrary to the letter and spirit of Rules 26 and 30 of the Federal Rules of Civil Procedure.

(f) The complaint filed herein asks a judgment for treble damages and reasonable attorneys' fees, as provided in the antitrust laws. Not content with this remedy for compensation of attorneys provided by the antitrust laws, plaintiffs are seeking a part of this judgment in advance of any showing of merit to their claim.

(g) Although plaintiffs have been present on at least two occasions when the Court stated that it was advisable that all defendants follow Union Electric Power Company in taking said depositions instead of scheduling separate depositions of the same witnesses and although plaintiffs insisted that in the stipulation of April 1, 1954, all answering defendants agree to enter their appearances at said depositions, the instant motion of plaintiffs seeks to bar all rights of discovery of defendants other than Union Electric Power Company.

WHEREFORE, this defendant joins in requesting the relief prayed for in the Motion of Defendant Union Electric Power Company for Time, Place and Circumstances of Taking Depositions, and prays that the order of this Court recite that at said depositions defendant Interstate Power Company shall have the right to appear and cross-examine the witnesses called by defendant Union Electric Power Company.

May 16, 1955

Filed order re depositions of Harry J. Strong, Riley, J. (Said order is set out below.)

Now on this 16th day of May, A. D., 1955, the above matter coming on to be heard upon the motion of the defendant, Union Electric Power Company, and the related motions of Interstate Power Company and the Iowa Utilities Association for a time, place and circumstances for the taking of depositions, and the plaintiffs appearing by J. R. McManus, Allen R. Shepard, Xavier C. Nady and James C. France, and the defendant, Union Electric Power Company, appearing by Robert H. Walker, one of its attorneys, and Interstate Power Company appearing by Robert Bergstrom, one of its attorneys, and Iowa Utilities Association appearing by Sherwin J. Markman, one of its attorneys, and Iowa Power and Light Company appearing by Howard Steele, one of its attorneys, and Iowa Southern Utilities Company appearing by Maxwell O'Brien, one of its attorneys, and upon good cause being shown, and it appearing to the Court that the matters recited in said motion are important to the orderly disposition of the discovery procedure in this action, it is Ordered as follows:

(1) The defendant, Union Electric Power Company, will proceed to take the deposition of Harry J. Strong, one of the plaintiffs in this action, commencing at 9:00 a.m. on the 6th day of June, 1955.

(2) The place of the taking of the deposition of Strong is by the Court ordered to be in the Davenport Bank Building in the City of Davenport, Scott County, Iowa, or at the Grand Jury room in the Federal Building in Davenport, Iowa, or at such other place as may be mutually agreeable. The rental expense thereof shall be borne by the defendants.

(3) During the taking of the deposition of the said Strong, defendant, Union Electric Power Company, shall conduct such deposition from the hour of 9:00 a.m. to 12:00 noon and from 2:00 p.m. to 5:00 p.m. in the afternoons each day until the deposition is completed, Saturdays and Sundays excepted.

(4) Mr. Michael T. Organ, or in his absence Earl W. Radford, both of Chicago, Illinois, is hereby appointed by the Court as commissioner to take the deposition at the time and place as herein provided, all in accordance with Rules 28 and 30 of the Federal Rules of Civil Procedure and is for that purpose commissioned to swear the witnesses, proceed with the taking of the depositions and sign the certificate upon completion of the taking of said deposition.

(5) All of the documents heretofore filed by the plaintiffs herein, whether by stipulation, by order of the Court or by voluntary submission, shall be produced by these plaintiffs at the time of the taking of the said deposition.

(6) The plaintiff, Harry J. Strong, is directed to appear and present himself for examination by the defendant, Union Electric Power Company and other defendants, in accordance with the procedure prescribed in the Rules on the days and date heretofore provided for the beginning of the taking of said deposition and thereafter in accordance with the time and times, day and dates prescribed by this order for the taking of said deposition and to continue to subject himself to the jurisdiction of this Court and the examination as a witness at the deposition until the same has been concluded.

(7) The parties hereto shall proceed with dispatch in the taking of the deposition first of the plaintiff, Harry J. Strong, and upon the completion of the taking of that deposition, unless otherwise stipulated by the parties, the defendant, Union Electric Power Company, is directed by the Court to report such fact to this Court by way of motion for the setting of future depositions heretofore requested to be taken by the defendant, Union Electric Power Company, at which time this Court will rule upon the time and the place and the circumstances of the taking of the depositions of the other witnesses whose depositions have been requested by the defendant, Union Electric Power Company.

(8) Although the motion herein filed resulting in this order has been filed on behalf of the Union Electric Power Company

only, all defendants herein are privileged to appear and examine or cross-examine the witnesses called by the defendant, Union Electric Power Company, if they wish to examine said witnesses and no further orders will be granted by the Court to any of the defendants herein for the taking of the depositions of these witnesses requested to be examined by the defendant, Union Electric Power Company, nor may their further depositions be taken on notice except for good cause shown.

May 23, 1955

Filed Order appointing Wayne G. Cook as Special Master in connection with taking of discovery depositions, Riley, J. (R. 23.)

June 6, 1955

(The deposition of Harry J. Strong commenced on June 6, 1955, at the hour of 9:40 o'clock a.m., at Room 725, Davenport Bank Building, before Michael T. Organ, appointed by the court as commissioner to take said deposition. The transcript of the proceedings shows the following with reference to the attorneys and counsel for the plaintiffs, to-wit:

"Appearances:

James D. France,
Xavier C. Nady,
France, France & Nady,
First National Bank Building,
Tipton, Iowa.

James R. McManus,
Allan R. Shepherd,
417 Fleming Building,
Des Moines, Iowa.

Haley, Doty & Wollenberg,
1735 DeSales Street,
Washington, D. C.
(OF COUNSEL)
Attorneys for Plaintiffs,

By
Mr. James R. McManus,
Mr. James D. France,
Mr. Xavier C. Nady."

One or more of the attorneys of record in this appeal appeared on behalf of each of the defendants at every session during the Strong deposition. The following colloquy ensued between the Special Master and counsel prior to the swearing of the witness:)

SPECIAL MASTER WAYNE G. COOK: Gentlemen, the statement that I wanted to make is this: it may have to be prefaced a little bit. I think most of you know more of the background regarding my appointment than I myself.

About three weeks ago, as I recall the time, Judge Riley called at my office in Davenport, found I was in the Supreme Court at Des Moines, and asked if I could stop at his office for a few minutes before I caught my plane, and I had about thirty minutes with him. He saw me again the following Friday, when he was here in Davenport.

At the first meeting, he inquired whether I would be willing to serve in this rather unusual capacity during the taking of depositions, and perhaps some other discovery process here. My statement to him was that I was perfectly willing to serve, providing it was agreeable with everyone, but I did not want anyone to be embarrassed if they saw fit to prefer that I should not serve.

At that time I told Judge Riley, and I have no doubt that he conveyed to Counsel who were present at the hearing that

followed my interview with him, that I had previously represented Iowa Southern Utilities Company, and, much earlier, had represented generally, as a member of the firm of Lane & Waterman, the Iowa-Illinois Gas and Electric Company, or its predecessor. It had not been organized.

I also told him that I had had one special appointment by Iowa-Illinois in a matter pending in Peoria, which had been decided, ninety per cent of it, by Judge Adair some six or eight months ago, and that I thought that matter was entirely closed, and as far as I was concerned, that my employment had terminated.

Judge Riley sent me a tentative order. I do not recall the exact date it arrived here, I have been away for a week. At any rate, it arrived in the morning mail, and a letter accompanying it, saying he would call me at 10:30 during a recess in a jury trial he was holding, to ascertain whether I felt the form of the order could be improved upon, whether there were any powers that ought to be specifically mentioned, or the like. I made one minor suggestion about the thing when he did call at 10:30.

Before noon of that same day, there came in the mail a notice of appeal from the last order that Judge Adair had entered at Peoria.

The history of the matter was simply this: the question was one of jurisdiction of the court over a suit against Iowa-Illinois, the Davis Power interests in Moline, and Moline, or Sears, the Federal Power Commission, the Illinois Commerce Commission, and the Davenport City Council. I was associated in that with attorneys at Peoria, primarily to raise the question of jurisdiction of the Federal Court in Illinois over all of the parties, and motions to dismiss were filed and argued last summer, and within a very short period Judge Adair sustained the motions as to the public bodies, but did not rule upon the motion as regarded the other defendants. That is the motion upon which his ruling had been made, prior to Judge Riley's discussion with me, and, frankly, I wasn't even aware that we were still within the appeal period.

When the notice of appeal came in, I debated whether I would call Judge Riley, but it was the end of last week, and I figured I had to be in Des Moines on Tuesday, I would see him, that would be the easiest way. When I got to Des Moines

on Tuesday, I found that Judge Graven was holding court for him, and he was out of town, and he did not get back until Friday, and I did not see him until late Friday afternoon.

At that time he asked what I thought should be done, and I said that I had assumed that his order, which was tentative, that is, he had provided, I believe, for any objections on the part of people who were not there, and had not expressed a willingness that I serve, should be filed by June 2nd. That had gone by. I said the only thing I knew was, rather than disrupt the whole schedule, for me to inform Counsel of the situation this morning, and give them another opportunity to express any objection they might have to my serving in this capacity.

I want you to understand that my position has been from the beginning, and still is, that I do not want anybody to be embarrassed at raising any question about my qualification to do whatever this job is, and I am sure I don't know exactly what it is, or what it will develop into. So Judge Riley left it that I should make the further disclosure, which had not been made at the time that he discussed the matter with Counsel, and before he entered his order.

MR. McMANUS: Mr. Cook, at the meeting in Des Moines before Judge Riley on May 16th, I informed Judge Riley that I was thoroughly aware of your connection with two of the defendants heretofore, and that I had confidence in you and that the plaintiffs had no objection to your acting as Special Master in connection with the discovery proceedings.

I think, from what you have said, that you are still connected with the case in the Federal Court in Illinois, involving the question of the power to fix rates. Isn't that the question involved in that case?

THE MASTER: The question involved, actually, fundamentally, is the question of the power to fix rates. In other words, the question is that the Federal Power Commission, not the City Council, or the City of Davenport, is the body to fix rates.

The only question which has been decided, and part of which, only, is now on appeal, that is, the portion that related to the injunction against the two companies, or the company and, actually, the Davis Estate, which is not a corporation, is whether the court in Illinois had jurisdiction.

To the extent that there has been served a notice of appeal in a case in which I did prepare the motions and participated in the arguments before Judge Adair, on which his decision is based, that has been revived with respect to the remaining persons, companies or defendants by the appeal from the order sustaining the motion.

I have not been informed as to whether I was expected to follow the case or not. My employment from the beginning was a special employment to analyze the question of jurisdiction, and prepare the pleadings, and of course, in part, the brief on which Judge Adair's decision was based.

MR. McMANUS: At this stage of the proceedings, they are merely legal questions involved, is that correct?

THE MASTER: That is absolutely true. We just received, I noticed it this morning, it came in last week, a praecipe, or designation of the record, the complaint, and the motions, and the orders which Judge Adair entered.

MR. McMANUS: The plaintiffs will have no objection to your continuing to act in this matter.

After certain other discussion, the Master left the hearing room and the deposition of plaintiff Harry J. Strong commenced on June 6, 1955. (Tr. 39.) It was continued on June 7 (Tr. 139), June 8 (Tr. 206), June 9 (Tr. 285), June 10 (Tr. 441), June 13 (Tr. 553), June 14 (Tr. 660), June 15 (Tr. 734), June 16 (Tr. 860), June 17 (Tr. 1012), June 20 (Tr. 1135), June 21 (Tr. 1270), June 22 (Tr. 1426), June 23 (Tr. 1604), and June 24, 1955 (Tr. 1717).

Strong testified: I reside in Davenport, Iowa; I have been a director and a member since First Iowa was incorporated, originally being an assistant secretary and currently am secretary-treasurer and general manager; I have no other business activities other than in connection with the Cooperative but I have had minor farming interests since shortly before First Iowa was incorporated when I rented 26 acres from "Mr. Frank Gillmor, * * * specifically for the purpose of qualifying as a farmer, as we thought it was required at that time"; I currently own 26 acres of land which I rent and did dispose of a farm in Muscatine County about 18 months before the time of this deposition, a farm I got from Mr. Byron Layton or his wife

after Mr. Layton passed away in 1949 or 1950; My only other employment since being connected with the First Iowa was three weeks as an examiner for the Iowa Employment Service; I worked in the electrical field in 1918 and 1919; from 1927 to 1933 I was promoting rural electrification for Iowa Electric Company and other utilities as well by contracting with farmers to be their agent to secure electricity and then supervising the installation and wiring for the farmers, "I was the farmer's agent" * *, *; "never an employee of a private utility"; I have managed the Muscatine County Rural Electric Cooperative Association and its successor, the Eastern Iowa Light and Power Cooperative; I have been connected with electric generating and transmitting concerns of one kind and another "all my life", thus giving me "extensive familiarity". (Tr. 39-43, 47-51, 156-157, 208-210). Mr. F. A. E. Gillmor is from Dixon, Iowa, lives on and operates a farm, and is one of the original incorporators of the Cooperative. (Tr. 47, 49) The allegations of the complaint were based largely upon information which I have furnished the attorneys. (Tr. 41, 62) Strong further testified:

(Tr. 71) Q. Now, those then are the only facts upon which you base this conclusion?

A. There are many, many facts as indicated in the questions and answers of my interrogatories. I couldn't possibly recite them all without having that list before me, but there are so many, I would say hundreds of overt acts.

Q. Now, Mr. Strong, of your own knowledge, I am concerned with finding what those facts might be.

A. It is so voluminous it is impossible for me to remember them all without having the list before me.

Q. You are at perfect liberty to use anything that you have at your disposal with regard to refreshing your memory in connection with this matter, but by the same token, I want from you the answers as to the facts as you know them in connection with this matter.

A. What I have said to you I know. There are others. I would presume the only way for me to answer him would be to get a list of the interrogatories.

MR. McMANUS: He has invited you to refresh your memory from anything you have.

THE WITNESS: Unfortunately we are taking this deposition in a room that we were not prepared for until this morning, and my records are not here.

MR. McMANUS: He says you can refresh your recollection.

THE WITNESS: I will refresh my memory and answer that question.

MR. WALKER: That is fine.

After an adjournment for lunch, during which time the witness was invited to refresh his memory, the following ensued:

(Tr. 81) Q. Whatever you can tell me now as to those facts is what I want, from your personal knowledge, with regard to the acts of the defendants.

A. As I say, these acts commenced during the hearing before the Executive Council.

Q. What did those acts consist of?

A. I cannot answer or detail them until I have available the transcript and records, and they are in the Post Office Building. I will make them available, I will check them tonight, and have them for you.

Q. Do you mean to tell me, then, that all of the facts upon which your judgment was based with regard to the alleged conspiracy are based upon the Federal Power Commission hearing reports?

A. No, sir. There was no such statement made. I said the Executive Council hearing is part of what is required—

Q. Are there any other facts?

A. (Continuing) —plus the daily expense report sheet, which is like a diary to me, and which has been supplied to the defendant, and taken in microfilm form. Those are not available for me to get during the noon hour, during the recess for lunch. I shall get them, and have them, and from that I can give you the answers to those particular questions, which are but a small part of the answer to your question. (Tr. 106)

* * *

Q. Then you have no independent recollection of any acts other than would be disclosed in the documents which you have previously delivered?

A. I would say those documents would bring to my mind many things that I cannot bring back now. I am not trying to be evasive. I want you to know that. You go back 11 years, or how many years—go back seven years, and take the 11 years prior to that—I am mentally confused by you confining it to prior to the issuance of the license.

Q. But, Mr. Strong, it should be fairly easy for you to recall independently of any records at all, some of the things about which you complain in Paragraph 10(a) in view of the fact that that allegation confines itself to the activities of the defendants prior to the issuance of the license which must have been a rather important part of the life of your Co-operative?

A. Well, I might say that Mr. Nady questioned me for many, many days to try to bring that chronologically from the start of our incorporation in 1938, and Mr. McManus questioned me for days upon days, and it took a lot of weeks, and I might say months of work, and I might say three and a half years prior to the filing of this complaint to come to the point of filing a law suit. To try at this time to confine myself prior to July, 1948, or September—I should say September 1, 1948, when the license was issued, I would have to go through the records to get many, many instances of—

Q. Let me ask you this question. Would the records that have been produced by the plaintiffs in the form of documents and in accordance with the order of the court reflect all of those acts about which you complaint in Paragraph 10(a)?

A. I doubt that they would, Mr. Walker, very much. In other words, there—

Q. Well, it seems to me that we then are in a position where you have, you say, no independent recollection of any acts unless they are in these documents, and then you say the acts might not necessarily be disclosed by the documents.

Now, if they are not disclosed by the documents, and I can readily appreciate that you want to see those documents before you testify to those matters about which you have no recollection now, there must have been other acts then about which you have independent judgment and about which you can testify, or in the alternative you have no independent knowledge of any other fact. Now is that a correct interpretation of what the situation is at the moment?

A. No, that is not true at all. I certainly don't agree when you say that unless the instances are specifically set out in the transcript of the hearing before the Executive Council, or the Federal Power Commission, or before the courts—(Tr. 137)

* * *

Q. Well, now, is it a fair statement for me to make that from your own independent knowledge, and from what knowledge you can gain from a reference to the answers to the interrogatories, there are no other overt acts of these defendants about which you can now testify?

A. That is not true at all. If the records are here, I can testify—

Q. I haven't finished. From those records that you have here now. In other words, do these answers to the interrogatories bring anything else to your mind with respect to the allegations of 10(a)?

A. I am trying my best to think. I just at this particular moment can't recall the many things that I know are there. (Tr. 179)

June 7, 1955

Q. Now, was there any other evidence of any kind at that time during those hearings about which you have not testified that in any way led you to the conclusions asserted in paragraph 10(a)?

A. I would say that when I have time to check the transcript of those hearings there are many, many other answers that can be given to that question and pertinent to the acts of

the private utilities opposing the building of the project, or let me say, the licensing of the project. (Tr. 190)

* * *

Q. Would it be helpful if we would adjourn now until this afternoon?

A. I question it. I would say it would take me probably six to eight hours, probably a day to go over the transcript of the hearing before the Executive Council—both hearings of the Executive Council of the State of Iowa; the transcript of the Federal Power Commission, which is, my gracious, thousands of pages.

And to further go through the minutes and my daily diary with expense accounts.

I wish the Lord would bless me so that I could recollect all of them, but it is impossible at this time.

Q. I take it from what you have said that, so far as you have any independent recollection, without referring to these documents that you speak of, you have nothing further to add with regard to any further independent knowledge as to what these defendants might have done that led up to the allegation of 10(a)?

A. I believe that there are many more things that may easily come to me as time goes on, which will tie together, both after the license issued—which would tie together prior to the license issuing.

Q. But of this moment, you are in a position where you are not able to testify further with regard to 10(a) without going into your documents, is that correct?

A. Without going into it, I would say I can't, I haven't prepared myself by sufficient examination to give you, voluntarily, other items.

June 8, 1955

There are many, many more facts other than what is in the record of the Federal Power Commission that the defendants did to which we referred in 10(a). (Tr. 229) There are many,

many more things that the documents and records that we have as yet not gone through will bring back to me in answer to your question on 10(a). There are many, many more answers that we want to give relative to this. (Tr. 236) Now, I say to you that there are many more other acts of these defendants as alleged in paragraph 10(a). If Mr. Nady was here with his notes, he could refresh me as he read them, and I could say yes, and those notes are not here. We have not had time during this adjournment to go into the thousands, or hundreds let's say, of letters that will refresh me to the many, many things that I know are still untold. I have to go into them to recollect them. (Tr. 247) At this time I do not have any independent recollection of any other acts of these defendants as alleged in Paragraph 10(a) that are not contained in those records filed and produced and that I have not testified to. (Tr. 262, 263)

June 10, 1955

I will have to check the records to see if 10(b) refers to any other agreements than that of July 4, 1948. I certainly don't want to say there were not. There might well be many more things, and I am sure that there are, that would be that which I would consider an agreement. (Tr. 490) I know of no other agreements at this time to which we referred in 10(b) and until I can check further I cannot recollect. (Tr. 491)

June 13, 1955

Q. This morning, Mr. Strong, you told me that over the noon hour, you would attempt to determine the dates of the contract that you had with the Allen and Company during the period in which there was a conversation between Mr. Parrott and you on July 6, 1950 and October 6, 1950. Do you now have the date of that contract?

A. I do not.

June 14, 1955

I know that there are further matters with respect to the attempts of defendants to prevent issuance of a license as alleged in paragraph 10(b). There are many things, I am sure,

that will come to my mind from a further search of the records of First Iowa. (Tr. 677) I am not prepared to testify further with respect to 10(a) or 10(b) at this time. (Tr. 681) I don't have any recollection of any other conversations relating to 10(c) at this time. There might well be more. I can't recollect them at this time. (Tr. 695) There are more matters relating to 10(c). I shall try to recollect them. At this time I can't give you anything further. I am sure I can later. (Tr. 703) There are many more, I am sure, for me to recite relative to 10(c). I have not had time to get the full information to answer the questions that you ask. (Tr. 711) I am sure that I have not covered all the facts as alleged in paragraph 10(c). There are others. (Tr. 719)

June 15, 1955

There is of course more facts to support 10(c) of our complaint. There are more facts in regard to matters alleged in paragraph 10(c) other than what I have told you. I cannot recollect them at this time. (Tr. 770)

With respect to the allegations of paragraph 10(d) of the complaint, there are more facts than I have given you. I shall have to check the records, books and papers to refresh my memory, but at this time, I cannot recollect. (Tr. 825) I am sure that there are matters to support paragraph 10(e) of the complaint that I have not previously discussed. Of course, I will want to recheck the records and refreshen my mind so I can give you the answers. (Tr. 827) I feel that there are instances to support 10(e) and I shall attempt to go over the records and alert my mind so that I can testify as to them. (Tr. 829) I am sure that there are matters that have come to my knowledge since the filing of the complaint that pertain to paragraph 10(e). (Tr. 832) There might well be knowledge I have now with respect to 10(e) I did not have at the time we filed our complaint. If there is, it is in the memoranda and data I have given to counsel, or that I have that will permit me to recollect and testify further as to 10(e). (Tr. 835) With respect to 10(f), there are other matters that I have not testified to. As soon as I have time to go over that I would be very glad to testify on it. (Tr. 838) There are other matters relative to 10(f). I am not alert to them and not prepared to testify. (Tr. 840)

June 16, 1955

I cannot at this time give any other independent facts that I have in connection with paragraph 10 of the complaint that I have not previously testified to. There are others, but as yet I have not completed my examination of the records and am not prepared to testify at this time any further on 10 that I can think of. (Tr. 908)

June 17, 1955

There are more facts with regard to the allegations of paragraph 10 of the complaint, but I don't believe that I can give you any further information until I can go through a search of the records. (Tr. 1031)

June 20, 1955

Referring to paragraph 12 of the complaint, there are other efforts we made to finance this project. I can't recollect at this time there having been so many until I can check the records. (Tr. 1146) Referring again to paragraph 12, I know there are more, and I shall try to get that information for you. At this time I can't recollect the other things so as to be able to testify to them at this time. (Tr. 1162)

June 21, 1955

I can't recollect of any other information as to paragraph 12 at this time. It having been several days since we discussed paragraph 10 of the complaint, I can only say that there are other facts than what I have testified about, but I can't recollect them. I haven't had time to go into all of the records, to say to you that what I have testified to covers it all. At this time I can't recollect of anything further to testify on. (Tr. 1280, 1281) With respect to paragraph 13, there might well be more, I can't recollect them at this time, and without repeating them I believe the answers have been given as much as I can recollect at this time. (Tr. 1288) As to the matters referred to in paragraph 13, I can't recollect at this time any matters not previously testified to or answered in the interrogatories. There are more, and I cannot recollect at this time without having the oppor-

tunity to examine all the records in this case. When I have had the time to go over all of the records, there might well be more. I can't recollect them at this time. (Tr. 1291) I cannot say that when I gave you the names of the banking institutions for paragraph 14, that I covered them all. I cannot recollect more than that which I have testified to at this time. There might well have been, and I am sure there are others which I cannot recollect at this time. (Tr. 1295) I am sure that when I can go through my records, there are others, and I shall try to get a recollection of that and give it to you. I feel certain that there are other answers to paragraph 14 of the complaint concerning defendants' unfair competitive practices, about which I have not previously testified, but until such time as I have an opportunity to go into the records and check what has been testified to, and our answers to the interrogatories and the books and the records, as furnished with the answers to the interrogatories, and in the court, and under the order for the production of books and papers, I cannot at this time recollect further matters to testify on. (Tr. 1296, 1297) As to 14, I cannot recollect at this time anything further until I have had time as necessary to go over all of the records. I would say that probably there would be more, but I cannot recollect them at this time. (Tr. 1303) My answer to paragraphs 15 and 16 is the same. Until I have time to go over all the records in this case, I have no matters I have not previously testified to. There might well be more, and I am sure that there would be and will be when I have the opportunity to go over all of the records and be able to recollect. (Tr. 1312, 1313)

On this date counsel for Union Electric Power Company commenced his inquiries of Strong relative to the financial affairs of the Cooperative and the following information was developed:

The First Iowa Hydro Electric Cooperative does its banking through my account at the Central State Bank, Muscatine, Iowa. It is through my individual account and not through a separate corporate account. The individual account has never been produced. I think I have made personal contributions to the First Iowa Hydro Electric project. I have never totaled it.

"Q. Will you explain to me why an amount of cash that you have put into this project does not appear on this sheet dated from August 9, 1952, to January 1, 1954?

A. I said, and I say again now, that the last date given on those reports, my audit might well reflect that I have put in, or handled the money might well reflect that I have more than my salary coming. If it is, it is a very small sum but I would rather believe that at this time, at that hearing, I had probably —how can I say it?—less than the total salary from the first of the organization to that date.

Q. How much actual cash money, of your own money, have you turned over to the First Iowa Hydro Electric Cooperative since its existence?

A. As reflected in that, as of my own money, I would say none."

After a short recess, Strong further testified:

"Mr. Walker, I would like to make myself clear. I can't enumerate the many times I have put money, my personal money into this situation. In other words, I was the first treasurer, those records stem from the time that I kept the records as the manager as this was kept as a so-called running account, I have no recollection of the many, many times that I have put money in, and then when advances or contributions were made, it would replace my money, and until a complete audit or a bookkeeping system is set up from those records, I certainly wouldn't have it be misunderstood that I didn't use any of my money in this. I did."

Q. Let me put it this way. As of this date, do you have any of your own money in this project?

A. I can't answer again whether I have expense money due me in addition to my salary or how close it is to being just my salary coming."

* * *

Q. Have you made any contributions in the sense that these people have made contributions as listed on this sheet, dated August 9, 1952, to January 1, 1954?

A. I think giving of my time and devoting my full time—

Q. I am talking about cash.

A. In the same sense as they advanced it?

Q. Yes, that is correct.

A. I can't say that I did. Mine would be a question of using my money until contributions came in, and then getting it back, then if we got short again, I would use my money until contributions came in.

Q. Yours was only a temporary advancement, then, in other words?

A. That is correct, I would term it as such.

Q. Now, where did you say that bank account was kept?

A. My personal bank account is kept in the Central State Bank at Muscatine."

Strong further testified as follows:

I have some records in the vault of the C. C. Hakes Company at Muscatine and at my home. I don't remember whether I have cancelled checks and deposit slips of the banking account or not. I carried it as a personal account. I was authorized to do so by the board. I don't think that my personal accounts are a part of the books and records. I won't produce anything of my personal records. As far as I am concerned, I am not offering my personal records for you to hash over. It is none of your business. None of the other members of the board of directors of the First Iowa Hydro Electric Cooperative are authorized to draw funds on this account. The only report I have ever made to the board of directors is reflected in the daily diary expense accounts and it may show the contributions made.

"Q. Of the $133,029.59 reflected in the report of August 9, 1952, to January 1, 1954, how much of that amount went through your personal account?

A. I have no way of knowing."

Strong further testified:

I cannot remember when I first started handling the funds of First Iowa Hydro Electric Cooperative. I did not always use my personal bank account but the funds were either handled

in cash or through my personal bank account. I used this account for my own personal purposes at the same time that it was being used for the deposit of the funds belonging to the First Iowa Hydro Cooperative. I cannot remember a distinct time when the First Iowa Hydro Cooperative had any substantial sum of money that was theirs and not mine. There has never been a bank account opened in the name of the First Iowa Hydro Electric Cooperative in any bank.

June 22, 1955

I do not have anything more that I can recollect concerning written agreements as alleged in paragraph 10(b) of the complaint. (Tr. 1521, 1522) I am not prepared at this time to testify further with regard to any acts of these defendants as to which I have not previously testified under paragraph 10. I cannot recollect of any at this time. I think there might well be more, and I certainly want to go into the records, because there is never a day goes by but what I can refresh my memory on something. (Tr. 1597) As long as this hearing lasts, and I keep poring over these papers as I say, I can always recollect something further in respect to the allegations of paragraph 10 of the complaint, and I will continue to do that and I want to do that. There are so many things that I certainly wouldn't want to say that I have covered them all. That is all I can recollect at this time. I believe I will be able to recall further by refreshening my memory. (Tr. 1599, 1600)

In reference to the financial affairs of the Cooperative Strong further testified as follows:

The daily diary expense account ends on February 18, 1954. As of that date it reflects all my expenses up to that time and all my disbursements. It is my opinion today that the Cooperative owes me in excess of the salary. I have no explanation for the expenditure of $18,575, collected between August 9, 1952 and January 1, 1954. I would say that some of the $18,575 did go through my bank account. I can't tell how much.

"Q. Then, Mr. Strong, how do you account for the difference in the amount of money collected and the amount of money spent?

A. I have no answer for it. As I have said, I can't answer

it until an audit is made of the books. It is my opinion they owe me today moneys as expenditures in excess of the salary that I have due me."

At this point in the transcript (Tr. 1456-1477) it reflects that Mr. M Manus objected to further questions regarding the finances of the Cooperative, and after a long discussion between counsel Mr. McManus stated that he was going to file a motion with the Master prohibiting further inquiry into finances. Thereupon, the Master was called into the hearing room and after being apprized of the issue stated that he would like a few hours to read the transcript on the matter under consideration. After the lapse of a few hours the Master returned to the hearing room stating that he had reviewed the transcript and had an idea of the background that brought this issue to a head. Mr. McManus then stated that he desired to move for a protective order pursuant to Rule 30(b) and (d) of the Federal Rules of Civil Procedure limiting the scope of examination on the ground that the proceedings were being conducted in a manner to annoy, embarrass, oppress and cause the plaintiffs needless expense, in that it was an attempt to conduct an inquisition and go into personal matters. Mr. McManus stated that the situation with respect to Strong and his Company was a matter in which the defendants were in no way concerned and that if Strong's company was satisfied with the way he kept his records that was an end to the matter. Mr. McManus further objected that this was not an accounting suit.

The Master then stated:

> "I have read the transcript, as I said a while ago, everything except, I think, two sessions, that I omitted before I got to these last two, and while I realize the delays that are involved it seems to me that those were from both sides and they are just almost inherent in the situation, and I can't say that I have observed in the matter of the general scope of the deposition anything that indicated an abuse of the discovery process.
>
> "Now, when we get down to the particular financial statement on the other hand, that has been my understanding, and I think there is some conflict in the rulings in the various Circuit Courts on the subject, but it is my understanding that discovery does require the production of

everything that has a bearing or that the adverse party has reason to think, and might lead to competent evidence, but I also think that it is not required that the parties producing records; well, take for example, your audit proposition here. I believe that when the papers are all there, and he has been examined and has gone on record, if he has unequivocably testified as to their correctness in his estimation, I don't believe that he can be required to do the accounting.

"I recognize that this is not an accounting suit, and that if you have furnished the information from which it can be ascertained, it would be their obligation to put the figures together. Now that is modified, in my judgment, a little bit by the way that the thing comes to a head on the specific question of this eighteen thousand some-odd dollars that is indicated. It doesn't balance out.

"Now, I think as to the witness, that they are entitled to interrogate the witness as to what, if any explanation, he has at this time, and if he says he has none, I would think that was the end of it, or whatever it is."

Mr. Walker then stated that he wanted to express the position of the defendant Union Electric Company with regard to the plaintiff's motion and the question of the financial records of the Cooperative, stating in part as follows:

"We think from the standpoint of damages that it has something to do with the property that the Cooperative owns and what it amounts to and what the amount of the contributions are, and are they to be repaid, and what part that plays and the ability and the capacity of the Cooperative to purchase lands and do those other things that the records in this case disclose must be done by the plaintiff Cooperative.

"We think that it has to do with the feasibility of the project and whether or not any bonding company would ever be willing to finance a project where it has been disclosed that the books and records have been kept in such a haphazard and negligent fashion. We think that among other things Mr. Strong has testified with regard to matters as they relate to his financial diary, and now it becomes evident that the financial diary is not correct. If the financial diary is not correct, it seems to me we have a right to inquire and receive an explanation from Mr.

Strong as to why it is not correct, and have him explain to us those items which do not appear.

"The evidence here discloses that Mr. Strong has said that the financial records as produced and filed in this case completely disclose all of the expenditures and all of the money that has been taken in in connection with the First Iowa Hydro Electric project, and still, in an examination of the very last pages in connection with those financial documents there is an item of $18,575.00 for which there is no explanation in these records, and which Mr. Strong should be made to explain to our satisfaction.

"Now, with respect to the question of the production of books and records, Mr. Strong, by order of Court, was required to produce all of the records that had anything to do with the lawsuit. Upon examination yesterday he disclosed that he had not produced canceled checks and checkbooks, deposit slips, and other matters pertaining to his own personal accounts.

"The reason I inquired in connection with his personal account was because of the admission made in the record by Mr. Strong that there was a commingling of the accounts of the Cooperative with his own personal account."

Mr. Walker moved that Strong "be required to produce all of the bank books, all of the check books, canceled checks, deposit books and bank statements in connection with his account, in which the funds of the First Iowa were commingled." (Tr. 1554)

He also moved that the bank produce any microfilms of their records and offered to pay whatever expense was necessary to get copies of the microfilmed bank records.

After further argument between counsel the Master then said:

> "It seems to me that on the question of the financial reports, and the accounting for the $18,000.00, or for the period there, the fact that it doesn't jibe, that the record speaks for itself as to what differences there are, and, when the witness says, 'I can give you no explanation,' there is nothing that the Special Master can do to change the situation there. Further interrogation, I presume, would get the same answer.

"On the other hand, I am definitely of the opinion that you are not required to accept his statement that this account contains all of the records of expenditures or receipts; and in view of the fact that there is the intermingling, I think you are entitled to the production of the records regarding the personal account, all of them, if they cannot be segregated; those that relate to the First Iowa Hydro Electric business if they can be segregated, and if they throw light on this discrepancy, I think you are entitled to that information.

"On the other thing, I certainly am in sympathy with the rule that gives to the Court, and here it has been delegated to me, the power to prescribe such safeguards as are necessary to prevent oppression; but frankly, Mr. McManus, I don't believe that is any indication in the record here that that is the intention. The fact that it gets into Mr. Strong's personal accounts is actually simply because of the way it was handled."

Mr. McManus argued that the financial records already produced and the answers to interrogatories by the plaintiffs were sufficient information and that oral inquiry into the financial affairs of the Cooperative would amount to a duplication. Thereupon the following occurred:

"THE MASTER: It is my feeling that the position on other sources, or other discovery procedures, cannot be mutually exclusive; certainly I cannot rule in regard to that without familiarity with everything that is produced, and all the rest.

"My understanding was that interrogatories would be asked, and answers given; that depositions may cover the same territory. Naturally, you would want more than was given in the interrogatories. You wouldn't be asking exactly the same thing, merely to get another answer to the same thing as was answered in the interrogatories, but if you don't get an answer to one question, you proceed from one to another. I really don't know what to say about that. I thought that was being recognized.

"MR. McMANUS: Here are the answers to the interrogatories that have been filed in this proceeding. Much of this time has been taken with going into matters that

were already disclosed in there, and that is the thing I am kicking about.

"THE MASTER: But even in the deposition itself, the bulk of the time has been used in inquiring of Mr. Strong what facts he had, what facts he knew of, to substantiate things, and so far I don't think any of them are down to anything except, 'Well, there are more', which indicates to me the necessity for not limiting it to answers to interrogatories.

"I realize the thing has branched off, I mean, the last few days, on this subject that has raised this particular question, which involved something quite different.

"MR. McMANUS: That is right, I never raised any question before today.

"MR. WALKER: I don't think any reference was ever made to the interrogatories, except by the witness or the witness' counsel.

"I have asked him specifically if he wished to refer to the answers to the interrogatories to refresh his memory, or any place that he wanted to look.

"I wanted his personal knowledge with respect to the matter, and I did not specifically want the answers particularly that he had made to the interrogatories, and I have not, I don't think, asked one question that was the same as the answers to the interrogatories, or as the interrogatories themselves."

The Master then stated that he would sustain the motion made by counsel for Union Electric for production of the bank account in which the funds of the Cooperative had been intermingled and that he would enter a formal order the next day after further study of the transcript.

June 23, 1955

At this time I have no other information relating to engineers other than I have testified to or furnished in the answers to interrogatories or papers produced in this case. (Tr. 1613) At this time I have no other information or facts relating to banking groups other than those I have testified to or furnished

in the answers to interrogatories or papers produced in this case. (Tr. 1616, 1617)

Q. You mean by that answer, Mr. Strong, to preclude the possibility of having further knowledge or recollection with respect to this matter sometime during the pendency of this action?

A. Nobody is ever going to get me to close the door. Nobody is ever going to let me think that there aren't things that will come to my mind while I am in bed, while I am sleeping, while I am driving in the car that I can't recollect at this time. I will never close the door. I am sure that there are more—I can't recollect them. I will be glad to testify to them if I could recollect them, but there is not an hour of this day that things don't come to my mind, and I am never going to close the door that this is off. I will give it to you as I can recollect them, and I want you to know that nobody is ever going to foreclose me in remembering things that may come later or a recollection that comes to me. (Tr. 1617-1619)

At the hearing on June 23, 1955, the Special Master dictated into the record the following order:

"On the motion of Mr. Walker appearing on page 1554 of the transcript and enlarged on page 1584, the ruling is that the witness produce any and all check books, canceled checks, deposit books and bank statements relative to his bank account which he has testified was used for funds of the First Iowa Hydro Electric Cooperative which he has in his possession covering the period from the inception of said account to the date of commencement of this action and that such production be made at the opening of the hearing on Friday, June 24, 1955.

"Further ordered that the witness forthwith apply to the bank for the originals or copies of any ledger sheets, bank statements, canceled checks, deposit slips and other records in connection with said account which the bank has and which the witness cannot himself produce, and that he authorize and direct the bank to supply him with such originals or copies, including microfilmed or photographic records, the cost or expense of procuring them to be paid by the Defendant Union Electric Power Company, and that the documents be produced or cause

be shown for their non-production by the witness within 10 days from the announcement of this ruling.

"Now, that is the ruling on the motions which were made yesterday." (Tr. 1684-1685)

Counsel for plaintiffs suggested an adjournment for two weeks for personal reasons and to allow defendants an opportunity "to get your checks in" (Tr. 1676). The Master ordered that after the session on June 24 the deposition be continued to resume on July 11, 1955, and further ordered that the bank records be produced at the office of the Master, stating:

> "Let the record show that said bank records referred to shall be available for inspection to any of the parties hereto or their representatives." (Tr. 1686)

June 24, 1955

Strong was questioned during the morning on matters other than financial affairs of the Cooperative and at Noon on June 24, 1955 the deposition was adjourned pursuant to the prior order of the Master to resume on July 11 (Tr. 1780). At the conclusion of the hearing on June 24, the following statement was made to Strong by Mr. Walker, counsel for the defendant Union Electric Power Company:

"Now, Mr. Strong, the hour of noon is fast approaching. When we recess today and come back again in two weeks, I will again inquire of you, among other things, about those matters which you have not given complete answers to. I will further inquire of you with regard to the matters that you have testified you are sure you will be able to give me further information on with respect to the allegations in this complaint.

"In addition to that, I will question you in connection with the question of preparedness to do business in this project, and I will question you further in connection with the finances of the project.

"I tell you this now so that over the next two-week period, you will be able to devote your time to those matters, so that you can come back here in two weeks prepared to answer those questions.

"I think that the record should show now, Mr. McManus, that by agreement of counsel for the plaintiffs and the defendants, and pursuant to the order of the Special Master in this case, we will now recess the taking of the deposition until 10:30 A. M. on July 11, 1955, unless you have something else you want to say.

"MR. McMANUS: I merely wanted to suggest, Mr. Walker, that the proceeding has extended over three weeks, and you have so completely and thoroughly delved into many of these matters in such minute detail, this witness has not been afforded time and opportunity to answer and dig out the multitude of facts that you have sought to elicit, because the interrogation extends over a long period of time, by that I mean it embraces a period of 17 years, and it has been physically impossible to obtain, after the sessions were over for the day, all of the information that you are seeking, and Mr. Strong will try to get as much of that together as he can during this recess.

MR. WALKER: I am fully aware of that, Mr. McManus, and I mentioned it only to give Mr. Strong some idea of what I would be interested in when he returns in two weeks. I hope, Mr. Strong, that the two-week period will give you an opportunity to get those facts for me."

June 27, 1955

During the adjournment, counsel for defendants learned from Mr. Edmunds of the bank that the necessary checking and copying of bank microfilms would take bank employees about 100 days, and accordingly selected Bawden Brothers, the photographers who had microfilmed the other documents produced by plaintiff, as their representatives in accordance with the foregoing direction of the Special Master. (Tr. 1803-4)

The bank informed defendants' counsel that Strong had given oral instructions not to use anyone but bank employees, which would delay the copying far beyond the time limit. (Tr. 1803) Being advised of these facts by counsel for the defendants and of a request by the bank for instructions, the Special Master telephoned the bank and advised them that the use of Bawden Brothers was within the scope of the orders and that he would send them a written order confirming that fact. (Tr. 1795-96)

Accordingly, on June 27, 1955, the Special Master trans-

mitted to plaintiff Strong, to Central State Bank, and to counsel for defendant Iowa-Illinois, an order expressly reciting that the bank was authorized to employ assistance outside of its own staff in preparing the records, that Bawden Brothers, Inc., were hereby authorized to photostat the records, and that the bank was authorized and requested to send to the Special Master a list of the documents sent to plaintiff Strong. (Tr. 1793-4)

July 11, 1955

At the reconvening of the deposition on July 11, 1955, plaintiff being represented by counsel of record and each of the defendants being represented by one or more counsel, and the plaintiffs Strong and Gillmor being present, plaintiffs' attorney McManus, at the commencement of the proceedings stated that he had a matter that he wanted to take up with the Special Master. Counsel for the plaintiff then asserted that the act of the Master in entering the order of June 27 was an act showing "partisan interest" and that "you ought to withdraw and disqualify yourself from further acting in the matter." (Tr. 1792) Plaintiff's counsel also complained of the fact that although on June 6, 1955 the Special Master had freely disclosed that he was representing defendant Iowa-Illinois in the Peoria case, he had failed at the same time to mention that his firm was representing in the same case the Davis Estate, which sells power to that defendant. (Tr. 1798-9) Plaintiff's counsel suggested that the deposition be continued in order to afford an opportunity for him to file an application with Judge Riley for the removal of Mr. Cook as Special Master. (Tr. 1800)

Plaintiff Strong broke into the hearing with the following statement (Tr. 1809-11):

"THE WITNESS: Mr. McManus, I would like to say that it is a manufactured lie to say that I told that Bank not to get anybody but their employees.

"MR. McMANUS: That wouldn't make any difference.

"THE WITNESS: . . . . I didn't even tell Mr. Edmonds or anyone to use no one else but their employees, that is an absolutely manufactured lie.

"MR. McMANUS: It wouldn't make any difference whether you did or whether you didn't because you would have—

"THE WITNESS: Mr. McManus—

"MR. McMANUS: Just a minute.

"(continuing)—a perfect right to tell the Bank that you didn't want anybody except the banker's employees examining your checks.

"THE WITNESS: . . . .

". . . .

"I want you to know that this is a manufactured lie, either through the Master, Mr. Edmonds, or the Lane & Waterman firm, to manufacture a lie. I didn't tell anybody this. I have no objections to having them today, or tomorrow."

The Special Master explained that he had entered the order of June 27 after he had been informed that it would require far in excess of ten days for the bank to produce its records if it all had to be done by bank personnel; that it is recognized at the time of the original order that bank personnel might not be able to do the work but that it was also definitely felt that photostating might have to be done by outside parties and that the question of whether it was done by bank personnel was wholly dependent on whether they could do it expeditiously and within the ten day period. (Tr. 1795-97) The Special Master also stated (Tr. 1798):

"I might say this that I don't know what place the representation of Davis Water Power has on this particular phase of the question.

"That was a matter that was inherent in the disclosure made in the beginning relative to the appearance in the Peoria Light case.

"I don't regard it as having any bearing here, and while I have no criticism of counsel raising it, I want the record to show that I disagree definitely with his conclusion that the entry of this order indicates any partisanship in the conduct of this hearing insofar as it is within my province to supervise it."

July 12, 1955

The deposition of Mr. Strong continued during the morning of July 12, 1955, on matters other than finance, but in the afternoon plaintiff's counsel announced that he had informed the District Judge by telephone of his intention to file an application for removal of the Special Master Cook and he suggested adjournment until a ruling was obtained from the court. (Tr. 1910) Mr. McManus stated that Judge Riley had indicated to him that the matter might be heard sometime in the following week. Accordingly, after discussion between counsel for plaintiffs and defendants, the depositions were recessed on July 12 under the following stipulation:

"MR. WALKER: Let the record show, then, that by agreement of the attorneys for the plaintiffs and the attorney for Union Electric Power Company, the present deposition of Harry J. Strong will be recessed from this date until 10:30 a. m. on Monday, July 25, during which time the plaintiffs' counsel will expect to file a motion with the court contesting the appearance of the present Special Master, and which said application or petition will be presented to the court in the interim and argued on Thursday, July 21.

July 18, 1955

Filed plaintiffs' motion to vacate order appointing Special Master Cook and to remove Special Master and to quash portions of the discovery proceedings.

July 21, 1955

Filed plaintiffs' motion to vacate order appointing Special Master and to remove Special Master Cook and to quash portions of the discovery proceedings.

July 21, 1955

Filed amendment to plaintiffs' motion to vacate order appointing Special Master and to remove Special Master Cook and to quash portions of the discovery proceedings.

July 21, 1955

(Abstract of proceedings before Riley, J. on July 21, 1955, re plaintiff's motion to vacate order appointing Special Master and to quash portions of the discovery proceedings.)

The hearing was opened by the Court. In addition to attorneys for the parties Harry J. Strong was present in person as well as the Special Master Cook.

The Court stated that the hearing was called for the purpose of the motion of the plaintiffs and the resistance of the defendant Union Electric Power Company. Thereafter there proceeded a discussion between the Court and Mr. McManus for the plaintiffs and Mr. Cook as Special Master, at which time the Special Master was invited by the Court to make a statement.

Mr. Cook then proceeded to state to the Court that he was in a little difficulty as to how far he should go in presenting the matters related to the proposition that was involved in the motion of the plaintiffs, and called the Court's attention to the fact that there was great discrepancy as to the factual situation. The Court thereupon advised Mr. Cook that he was not requiring Mr. Cook to make a defense. (Tr. 5)

In his statement Mr. Cook said that he undertook the job as Special Master at the request of the Court and on condition that it was agreeable to all parties. (Tr. 6)

Mr. Cook then related the fact that he had informed counsel and the Court of an action pending in the Federal Court in Peoria in which he was involved that had involved one of the defendants in this action and which case he thought was settled, had been appealed, and that thereafter he was in a quandary as to how to handle the matter. He related that he had contacted the Court and they agreed that he would make a disclosure at the beginning of the Strong deposition in Davenport. (Tr. 6, 7)

Mr. Cook went on then in his statement to say that at the time of his disclosure to all counsel he had named the Davis estate which his firm represented. At this point the Court told Mr. Cook that it was not necessary for him to make any further statement but that Mr. Cook was free to say anything he desired. Mr. Cook thereupon stated that he was not motivated by a desire to continue to serve but that he did not like the idea of

being in the position of quitting when he was under fire and that if the Court could find any way to relieve him without confirming the charge that was filed against him as an advocate with bias that he would be delighted to be relieved from further responsibility. (Tr. 9)

The Court then stated that he had examined the motion of the plaintiffs and that he understood that the motion falls into three categories. 1. to vacate the order of appointment, 2. to remove the special master, and, 3. a motion to quash a portion of the proceedings, i.e. all proceedings after June 22nd. The Court called attention to the fact that his understanding was that the Special Master had only been called twice. Once in connection with where the deposition hearings were to take place, and the other made as a result of a motion made by counsel for Union Electric for the production of bank records relating to the account of the witness, Strong insofar as there was a commingling of funds of the First Iowa Hydro Electric Cooperative in his personal account. The Court indicated that he understood that the Special Master had sustained the motion of Union Electric and that he would certainly sustain the ruling of the Special Master for the reasons given by the Master with regard to the question of the place where the deposition was to be taken. The Court further stated that it would sustain the ruling on the motion of Union Electric for the production of documents for the reasons given by the Special Master and would adopt the reasons which were given by the Special Master. (Tr. 11)

The Court went on to state that one of the reasons given for the vacation of the order appointing a Special Master was the failure of the Special Master to sign an oath, but the Court held that that was not necessary under the rules as interpretated by Newcomb vs. Wood, 97 U.S. 581. The Court held that Rule 53 requires no oath by a Special Master and went on to say that the Master in this case being Wayne Cook, had unusually limited powers, that ordinarily a Special Master was appointed that the Courts could refer the matter to him on the basis of the statement of the testimony, hear presentation of the law, make findings of fact and conclusions of law, after which they would be required to report to the Court, with the privilege of the party to file exceptions and take further evidence if the Court desires or feels it is necessary. (Tr. 12)

Further discussing the deposition, the Court indicated that it was conscious of the fact that the taking of the deposition was going to require considerable time and that it was apparent that defense counsel wanted complete discovery proceedings. Judge Riley then indicated that he had contacted Judge Gardner, Chief Judge of the Eighth Circuit, and that he was aware of the fact that the appointment of the Master shall be the exception and not the rule and he wanted the approval of Judge Gardner. The Court then volunteered that Judge Gardner had told him he thought the appointment of a Master in this case under the circumstances was eminently desirable. (Tr. 13)

The Court then went on to discuss in detail the manner in which he concluded who he would appoint as Special Master and how the appointment came about. Judge Riley then discussed a meeting in his chambers on May 16th at which time Mr. McManus for the plaintiffs and counsel for defendants as are represented locally in Des Moines and counsel for Union Electric were present to discuss the time and place of the taking of the depositions and reviewed the discussion that was held at that time concerning the proposal of the Court to appoint Mr. Cook and the agreement by counsel on both sides to the appointment only after plaintiff's counsel had retired to the library to discuss the matter when the Court disclosed to them some of the previous activities of Mr. Cook on behalf of one of the defendants. (Tr. 15)

The Court then went on to confirm the statement previously made by Mr. Cook as to the manner in which Mr. Cook would make disclosure of any development of the appeal in the case in the Federal Court in Peoria. The Court then stated that he would affirm and did affirm the first ruling of Mr. Cook with regard to the place of the taking of the depositions and completely approved the ruling of the Master with regard to the production of documents. (Tr. 17)

The Court then discussed the order of the Special Master of June 27th, which was issued by the Special Master ex parte, as to how the production of documents was to be accomplished. (Tr. 18) The Court proceeded again to approve the acts of the Special Master. Mr. McManus then discussed with the Court the question of when Mr. Cook had ordered the production of documents and discussed the use of outsiders in the bank and

the Court stated that it was inherent in the ruling that photostatic copies should be made of the bank records. (Tr. 23)

The Court again stated that he would rule as the Special Master had it been brought to him and stated further that he would consider also that it was the duty of the Master if the purpose of his initial order was to be accomplished to take such steps as were necessary to get it done. (Tr. 24) This answer was made to Mr. McManus who asked if the court understood that the Special Master had called the Bank and asked it to permit outsiders to come in to photostat the bank records and had later made an order covering the situation ex parte without any copies of the motion or copy of the order having been filed or presented to the plaintiffs' counsel. It developed that the order was made on the application of Iowa-Illinois which application was made verbally. The Court stated that as Special Master, Mr. Cook had the power of this Court to do everything that he had done. (Tr. 25)

The Court proceeded to let Mr. McManus introduce what portions of the record he wished and in discussing the matter further the Court said:

> "It is significant that no objection was raised to the qualifications of the master until the adverse rulings came on the matters affecting the bank account of Mr. Strong." (Tr. 29)

The Court proceeded to state that he felt that all counsel were fully informed as to Mr. Cook's connection with the Davis estate and that there was no failure to disclose. (Tr. 31)

The Court proceeded to state:

> "I consider that there is no warrant for the charges." (Tr. 32)

Thereafter, Mr. McManus called Mr. Walker as a witness for the purpose of identifying the record made at the deposition, bringing out the fact that Walker had been conducting the examination of the witness Strong. After an interplay concerning the exhibits and at the Court's request McManus and Walker agreed to meet after the hearing and agree upon the record. Walker was then further interrogated by McManus concerning

his activities on June 25th, 1955, at the Central State Bank in Muscatine, Iowa. Thereafter, McManus attempted to offer a skeleton transcript of proceedings in connection with the Davis estate, but the Court held that it was not necessary to offer them since they had been made a part of the record by adoption to the plaintiffs' motion.

The Court indicated that he had read all of the portions of the transcript of the deposition which affect the matters under discussion, and that he had read the motion as amended and that he was familiar with the substance of the resistance filed by Union Electric. The Court found that everyone acquiesced in Cook's appointment; that he adopted the basis of Cook's ruling on the motion to produce the bank account of Strong and bank records and went on to say:

> "I cannot find anything that causes me to believe that he has displayed any unfairness; that he has displayed any partiality; that he has displayed any bias; that he has displayed any partisanship, or that he has has shown any lack of disinterestedness. I am using the language that you have used, sir, in your motion [addressing Mr. McManus], and I cannot so find. Nor do I find anything that has occurred since I visited with him here in my chambers in May before the conference of May 16 with counsel: * * I may say to you that if a court in a situation in which I found myself with full, fair and complete explanation to counsel, may not appoint a Master when all of the parties have acquiesced without subjecting him to the harassment that he finds in the event of his first adverse ruling, it is going to make it very difficult for the Court to get men of ability and high integrity and a desire to render a public service to act in that capacity in the future."

The Court then overruled the motion of the plaintiffs and directed that an order would be prepared and filed, thereupon Mr. McManus asked for a continuance for the resumption of the taking of the deposition of Strong to assure the plaintiffs an opportunity to canvass the possibility of an appeal. (Tr. 89-91) The Court stated that he did not want the deposition unduly prolonged but suggested that the attorneys meet for the purpose of an agreement and offered his services in that re-

spect, if necessary, during the afternoon. Whereupon the hearing was adjourned at 1 o'clock, p.m.

July 22, 1955

Filed Memorandum and Order denying plaintiffs' Motion to Vacate order of appointment of Special Master Cook, etc. Riley, J.

July 22, 1955

Entered and filed order fixing time for resuming deposition of Harry J. Strong, Riley, J. (Said order is set out below.)

In the above matter, wherein the discovery deposition of Harry J. Strong was in progress at Davenport, Iowa, and was adjourned on Tuesday, July 12, until 10:30 o'clock a.m. on Monday, July 25, 1955, it has been asked by counsel for plaintiffs, and acquiesced in by counsel for defendant Union Electric Power Company, who is conducting the examination of the witness Strong, that the matter may be adjourned to a later date, and for cause shown;

It Is Ordered that the deposition of Harry J. Strong shall be resumed at Room 725 Davenport Bank Building, Davenport, Iowa, at 10:30 o'clock a.m. on Monday, August 1, 1955.

The mailing of a copy of this order to all parties in interest will constitute notice.

August 1, 1955

Filed order signed by Wayne G. Cook, Special Master, continuing the taking of the deposition of Harry J. Strong. (Said order is set out below.)

Subsequent to the Entry by the Court on July 22, 1955, of its order directing the resumption of the taking of the deposition of Harry J. Strong on the 1st day of August, 1955, counsel for the plaintiff has requested a further delay in the resumption of the examination of the witness Strong.

Counsel for the defendant Union Electric Power Company was requested to agree to the Entry of an order postponing the further examination of the Witness and has informed the Special Master that after consultation with counsel for all of the defendants appearing at the taking of said deposition it has been determined not to oppose the request of the plaintiffs. They also agree that the request to the Special Master shall be without waiver of the exception allowed to the ruling on the application to vacate the appointment of the Special Master and without prejudice to an appeal therefrom if plaintiffs should so elect.

Xavier C. Nady, counsel for the plaintiffs thereupon on July 29th, 1955 orally applied for a continuance until the 6th day of September, 1955.

Therefore, it is ORDERED that the deposition of Harry J. Strong shall be resumed at room 725, Davenport Bank Building, Davenport, Iowa, at 10:30 o'clock A.M. on Tuesday, September 6, 1955.

August 29, 1955

Filed notice of entry of appearance of Robert W. Bell and Bell, Farrar & Scott as attorneys for plaintiffs. (R. 28)

August 31, 1955

Filed plaintiffs' attorneys' motion to quash appearance of Bell, Farrar & Scott as attorneys for plaintiff. (R. 28)

August 31, 1955

Entered order for rule to show cause re motion to quash appearance and setting hearing at Des Moines, Iowa, at 2:00 p.m. on September 2, 1955, Riley, J.

September 2, 1955

Filed petition to intervene on rule to show cause filed by Harry J. Strong, et al, on behalf of all plaintiffs. (R. 32)

September 2, 1955

(Hearing before Riley, J., on motion to quash the appearance of Attorneys Bell, Farrar & Scott. Appearing for the plaintiffs were John Bell, of the Law Firm of Bell, Farrar and Scott, Rock Island, Illinois; J. Riley McManus, Des Moines, Iowa; Allen R. Shepherd, Des Moines, Iowa; X. C. Nady, Tipton, Iowa, and James D. France, Tipton, Iowa. Also present: Harry J. Strong, Davenport, Iowa. Defendants were not invited to appear at this hearing.)

THE COURT: We have a matter for hearing this afternoon. It arises by reason of an appearance filed here August 29, 1955, in this cause, No. 1-224, First Iowa Hydro Electric Cooperative, et al, vs. the Iowa-Illinois Gas & Electric Co., which is denominated Notice of Entry of Appearance, and it is signed by Bell, Farrar and Scott, by Robert M. Bell, attorneys for the plaintiff, entering appearance for all of the plaintiffs.

On August 31 a motion to quash this appearance was filed, and because of the pendency of the deposition presently assigned for the 6th day of September, to be resumed at Davenport, the Court entered an order for hearing on this matter today at 2 o'clock. The notice, I recognize, is short, but there is no other course to be followed.

I will be very glad to hear from you in support of your motion.

MR. HARRY J. STRONG: Your Honor, may I ask whether our petition for leave to intervene has been acted upon?

THE COURT: May I ask who is speaking?

MR. STRONG: H. J. Strong, First Iowa Hydro Electric Cooperative.

THE COURT: It is unnecessary for you to petition to intervene in this cause, because you are already a party to it. I will consider everything that is contained in this as a resistance to the motion to quash the appearance, but being already parties to the case it is unnecessary for leave to be granted you to intervene. You are already in the cause.

MR. STRONG: May I ask then that the Court rule upon our request that inasmuch as we have no counsel, and I am but a mere layman, and we are only in it as mere laymen and

have no counsel whatsoever, that a time be given to us to get counsel to properly represent us on the intervention?

THE COURT: Well, I can't agree with you that you have no counsel, because so far as the records of this Court disclose, you are represented by counsel.

MR. STRONG: I might advise the Court that the board of directors of the First Iowa Hydro Electric Cooperative adopted a resolution as of yesterday and discharged all counsel of this record, and therefore we have no counsel, your Honor.

THE COURT: And by all counsel, you mean those that are now of record for the plaintiffs in this case?

MR. STRONG: I wish to make that information known to the Court and the record, that they have been discharged and stand discharged, and we are without counsel.

THE COURT: Well, it is not as simple a process as that, because I will say for the record that it is as much the duty of this Court, as I interpret it, to protect the rights of counsel as it would be the duty of this Court, were the situation reversed, to protect the rights of the client.

I don't have the record before me excepting as I have very hastily examined the pleadings that you have filed as a petition to intervene, but on the basis of your statement I would say that that alone does not accomplish the purpose you seek, sir.

MR. STRONG: May I have a copy of that in the form of an order so we may retire then and appeal to the United States Court of Appeals in St. Louis on your ruling, your Honor?

THE COURT: Not on the basis of the record presently made. We would have a more ample record before that would be done.

You had someone else present here, I believe?

MR. STRONG: I am appearing for them; I am speaking for them.

THE COURT: And may I ask who are present in person?

MR. STRONG: Members and directors of the First Iowa Hydro Electric Cooperative.

THE COURT: Would you name them? I do not have the pleasure of their acquaintance.

MR. STRONG: Mr. F. A. E. Gillmor, who is president of the First Iowa Hydro Electrie Cooperative; Mr. Harry Imel, director; and Mr. P. H. Naber, a director.

THE COURT: Is Mr. Mitzner present?

MR. STRONG: Mr. Mitzner was unable to come. He was contacted and was unable to come.

THE COURT: Well, I observe that you are on your feet preparing to leave the courtroom. I would ask that you not do so at this time. I think it is to your interest to remain.

MR. STRONG: I think, your Honor, as a layman I feel helpless in this Court without counsel to properly defend me as an individual under my constitutional rights, which you now deny me by refusing to get counsel. We had no notice of this hearing, your Honor, till 5 o'clock last night, until we got a call on the telephone from Mr. Robert Bell, of Bell, Farrar and Scott, that he was cited to appear in this Court. We have received no notice whatsoever of this hearing. It was only by accident that we heard of it last night at 5 o'clock, and for that reason we have had no opportunity to get counsel.

I want you to know that our counsel, Bell, Farrar and Scott, withdrew from the case, advised us they withdrew last Tuesday. We have neither counsel with them nor do we have the old counsel.

THE COURT: Who withdrew, you say?

MR. STRONG: Bell, Farrar and Scott.

THE COURT: They have withdrawn?

MR. STRONG: Withdrawn to us as of last Tuesday.

THE COURT: Is there anyone here representing Bell, Farrar and Scott?

MR. JOHN BELL: I am, John Bell. I do.

THE COURT: Have you filed your appearance at all?

MR. BELL: Your Honor, we were taken in on this case. It was our understanding that if the other counsel were not aware of it they would not object, and we went in on that basis. When we found that they objected to our coming in on the case we told the members of the First Iowa Hydro Electric Cooperative that we did not want to be in the case, and we came down here today to file a motion to withdraw.

THE COURT: Have you filed it?

MR. BELL: No, I just got here.

THE COURT: It is your intention to file it?

MR. BELL: It is my intention to file this motion to withdraw as attorney at this time.

THE COURT: If you filed such a motion, that of course makes the question which we have for consideration moot.

MR. BELL: It is not our wish to be in the case if the attorneys of record do not want us in.

THE COURT: You may file—and you ask for leave to withdraw, that leave is granted.

MR. BELL: And that an order be entered to that effect.

THE COURT: Now that leaves us in the situation that existed before your appearance was entered. It makes the motion moot. It makes the question unnecessary.

MR. J. RILEY McMANUS: Also the petition of intervention. It isn't filed by any counsel of record.

THE COURT: It makes all proceedings moot.

MR. STRONG: I agree with that, your Honor. I wonder if it is not true that this question has come up for a hearing—and we were granted leave to intervene, we have asked the Court to set this for hearing in our petition, we asked for a ruling on our petition. It was granted, to intervene. We asked that the case be set, and that proper notices be sent out and it be set down for hearing.

THE COURT: Well, now you come to the question. The only thing before the Court as it now stands, since your petition is going to be on the rule to show cause, and the rule to show cause falls of its own weight by withdrawal of counsel, we have then a situation where there is nothing of record before this Court. I consider that all subsequent proceedings fall. But there is a controversy existing between you and your associates and your counsel, and that is a matter that I will be very glad to hear appropriately. I should advise you—and I do this not in the sense of expressing any opinion in the form of a final judgment—that it is not a matter in which the action that you take in the progress of the case, with counsel of record proceeding and the taking of depositions here, that the action you take can be final and binding without anything further.

There is no question, Mr. Strong, as I view it—I haven't made an extensive review of any of the authorities, I have had no opportunity to—but there is no question in my mind of the right of a client, either with or without cause, to discharge his counsel when he desires. But when he attempts to do so there are certain obligations that he must meet, because there are certain rights on the part of a lawyer. That is regulated by the nature of the employment. One of which is, for example, that he must pay the fees that may be due to the lawyer. And there are other relationships too that must be taken into account.

Now do you consider that the situation that exists between you and your associates and your counsel is irreconcilable?

MR. STRONG: Again I say to you that I am only a layman. I would much prefer to have the advice of counsel in speaking for this record. I say to you that the action of our previous counsel was the cause of Bell, Farrar and Scott withdrawing from the case. Their stink has brought it about. Consequently, I don't believe that they can file what they filed here in your Court on the 29th, bring about what they have brought about upon us, without a full and exhaustive hearing. And I think that the Court would serve the purpose of justice to exhaustively hear this thing rather than to make it a moot question; that by their trickery of taking this position and filing this petition, as they did, without any notice to the plaintiff or the individuals, bring about the withdrawal of the other counsel that we had, on completely false grounds, as is refuted on the

affidavit and petition four of the members of this Cooperative have filed. I think it is serious, your Honor, and it should be set down for a hearing before this Court.

THE COURT: But I have nothing to be heard, sir. There is nothing in the way of— And you have a right, and will be given time, to consult other counsel if you desire. But, I want to assure you, sir, that you and your associates, so far as it is in my power, will have your rights protected, and at the same time I have an obligation to counsel who are members of the Bar of this Court, to see that their rights too are not violated.

MR. STRONG: That is correct.

THE COURT: And I think time can be granted to allow you time to employ counsel, if that is what you desire to do, to have representation in the Court, have a spokesman for yourself.

MR. STRONG: That is correct.

THE COURT: So far as I am concerned, as soon as you will have formulated anything upon which the Court may act— I have nothing before me now; I have a record that is barren of the appearance of these people. The motion that they have filed, to quash his appearance, is granted in the matter of course on account of withdrawal—it isn't granted as a matter of course; it falls of its own weight.

MR. STRONG: May I ask your Honor: There is a request in that petition of ours requesting a postponement of the commencement of depositions to be commenced on September 6.

THE COURT: That is the next question that I was going to discuss with you. That is the reason that I suggested perhaps your departure should not be so sudden. Those depositions are to be resumed, as I understand, at Davenport on Tuesday the 6th.

MR. STRONG: That is correct.

THE COURT: Evidently, even though you and your counsel might ultimately find it in the interest of both of you that you go along together, at the present stage of the proceeding you are not prepared to go ahead without prejudice to your

own rights. And I think the Court, of its own motion, should continue those proceedings to a date later to be determined. Normally I have declined to interfere with the action of the Master, feeling that it is his duty, since he was appointed for that sole purpose, to make those determinations. But in the circumstances, as I did once before, I shall continue those hearings to a date later to be determined, and I will ask the Clerk to give notice to all counsel of record and to ask the Master to notify the Commissioner that the taking of the deposition of Mr. Strong, which was suspended, will be continued to a date later to be determined.

Now I will confess that I want to lend my offices in any way I can to bring about as harmonious a result as may be possible in respect of all of those here involved, clients and counsel. But I have nothing before me at the present time.

I will be very glad to hear any suggestion from Mr. McManus.

MR. McMANUS: The only suggestion that I have to make, your Honor, is this: I got over here about 10 minutes of 2 this afternoon and I learned for the first time of the filing of the paper which I am told was denominated Petition of Intervention, which I have not yet had opportunity to read. Apparently, from what my associates tell me, it is a scurrilous attack upon counsel for the plaintiffs of record in this lawsuit.

I would like to make the professional statement, your Honor, that prior to the time the entry of the appearance was filed in the office of the Clerk of this Court by the law firm of Bell, Farrar and Scott of Rock Island, Illinois, none of the plaintiffs had ever discussed with me the necessity or advisability or intention to employ other counsel, or that they consulted with them. So that the filing of that appearance by those lawyers was a complete surprise to me.

Subsequent events have been rather surprising too, so that I am unable to definitely state what position we are going to take at this time, except to suggest to the Court that we will take whatever steps we deem advisable and necessary to protect our rights and our interests, and to assure this Court that at all times in every way, at every stage of this law suit, all counsel for the plaintiff have conducted themselves in accordance with the highest standards and ethics of the legal profession.

THE COURT: Well, I may say to counsel that so far as anything has come to my attention, it has indicated only such course of conduct on your part. However, I repeat, there does exist a right on the part of a litigant to discharge counsel with or without cause, but, when that is attempted, of course, certain obligations may arise because of duties that may be owed to the counsel.

In the present state of the record there is nothing before the Court upon which the Court can act. When there is anything upon which I can act, after you have had an opportunity to seek advice, sir, I will set it down as promptly as possible. It happens that the only date that I presently have open is September 8. All of the days of the next week are occupied except the 8th. On the 12th I go to Davenport to open a two weeks' term there, and I will be there during that period. If the matter is ready during that period I may be able to give it attention there, because I assume it could be set down on shorter notice.

Following that we open on the 26th at Creston, where I have a full docket, apparently; and on October 3 at Council Bluffs; and again on October 17 at Ottumwa. So our docket will be rather full. We are making the rounds of the various divisions.

But I will try to accommodate myself to the convenience of counsel and clients and take care of the matter as promptly as possible.

Do you think of anything else, sir, that could be suggested at this time?

MR. STRONG: I am sure, your Honor, that we will make every effort to get counsel as rapidly as possible and advise the Court as soon as we have concluded it.

THE COURT: I want to make it clear to you that in suggesting to you that you are given this opportunity to seek advice and legal assistance, I am not in any way ruling upon the effectiveness of your attempted discharge of your counsel.

MR. STRONG: I understand that, your Honor.

THE COURT: Very well.

Do you have anything further, Mr. McManus?

MR. McMANUS: Just this suggestion, that the Court take judicial notice that there is not now on file or pending in this Court any motion to substitute counsel, and that we are still counsel of record for plaintiffs in this case.

THE COURT: Well, the Court will naturally take judicial notice of its own records.

September 2, 1955

Filed motion of Bell, Farrar & Scott to withdraw appearance. (R. 40)

September 2, 1955

Notice given by Clerk to Wayne G. Cook, Special Master, by telephone and to all attorneys of record, by mail, that Court continued date to resume taking of depositions at Davenport, to a date later to be determined.

September 3, 1955

Filed order continuing taking of deposition of Harry J. Strong to a date later to be determined and announced, Riley, J. (Notice given to Special Master Cook and to all counsel of record.)

September 6, 1955

Entered order that withdrawal of appearance of Bell, Farrar & Scott is accepted; and that petition to intervene shall not be filed, Riley, J. (Copies mailed to Bell, Farrar & Scott; Harry J. Strong, McManus, Shepherd, Nady and all attorneys of record.) (R. 41)

September 15, 1955

Filed order to resume taking of the deposition of Harry J. Strong at 725 Davenport Bank Bldg., Davenport, Iowa, at 10:30 a.m. on October 3, 1955, Riley, J. (Notice to all counsel and to Harry J. Strong.) (Said order is set out below:)

At the hearing at Des Moines, Iowa, on Sept. 2, 1955, in this matter, the Court on its own initiative, but on behalf of plaintiffs, continued to a date later to be determined the deposition of Harry J. Strong, then ordered by Wayne G. Cook, special master, to have been resumed on Sept. 6, 1955.

Because of the summary order of Sept. 2, 1955, of this court and of defendants' right to proceed with the taking of such deposition and for other good cause appearing:

IT IS ORDERED, That the deposition of Harry J. Strong shall be resumed at Room 725, Davenport Bank Building, Davenport, Iowa, at 10:30 a.m., on Monday, October 3, 1955, and that notice to all parties concerned shall be given by mailing a copy of this order to the witness and plaintiff, Harry J. Strong, and to all counsel of record.

September 16, 1955

Filed motion for leave to remove France, France & Nady and James R. McManus and Allan R. Shepherd as attorneys for plaintiffs herein. (Copies mailed only to James D. France, X. C. Nady, James R. McManus and Allan R. Shepherd.) (R. 41)

September 21, 1955

Filed letter of Wayne G. Cook dated September 21, 1955, to Hon. Wm. F. Riley, Judge, tendering his resignation as Special Master.

September 21, 1955

Filed Order accepting resignation of Wayne G. Cook as Special Master, Riley, J. (Copies mailed to all counsel, the individual plaintiffs, First Iowa Hydro Electric Cooperative, Wayne G. Cook and Edward A. Doerr on September 22, 1955.) (R. 48)

September 21, 1955

Order appointing Edward A. Doerr as Special Master, and that $2500.00 shall be paid by plaintiffs and $2500.00 by defend-

ants into the Registry of the Court for allowance of fees and disbursements of Special Master, Riley, J. (Copies mailed to all counsel, the individual plaintiffs, First Iowa Hydro-Electric Cooperative, Wayne G. Cook and Edward A. Doerr on September 22, 1955.) (R. 48)

September 26, 1955

Filed Plaintiffs' Motion to defer deposit of funds. (R. 50)

September 27, 1955

Entered order denying motion to defer requirement of deposit and deposit of $2500.00 be made forthwith, Riley, J. (Notice mailed to Edward A. Doerr, X. C. Nady, J. R. McManus and Harry J. Strong.) (R. 52)

September 28, 1955

Filed order continuing taking of depositions to October 10, 1955, at 11:00 a.m., Edward A. Doerr, Special Master. (Copies mailed to all attorneys of record, all plaintiffs and Michael T. Organ, Commission.) (Said order is set out below:)

This order is made by the Special Master on the informal application for a delay submitted to him by plaintiff Harry J. Strong.

The taking of depositions pursuant to rules 28 and 30 of the Rules of Civil Procedure and prior orders in this matter was formerly scheduled to be resumed at 10:30 o'clock a.m. on October 3rd, 1955. The taking of such depositions is continued so as to be resumed, in lieu of the above stated time, at 11:00 o'clock a.m. on October 10th, 1955.

September 29, 1955

Received check of Lane & Waterman for $2500.00 and deposited in the Registry of the Court at Des Moines, Iowa, paid on behalf of defendants in accordance with order dated September 21, 1955.

September 29, 1955

Filed order that motion of plaintiffs entitled "Motion for Leave to remove attorneys for plaintiffs herein" shall be heard on October 3, 1955, at 2:00 p.m. in the Petit Jury Room, Federal Building, Davenport, Iowa, Edward A. Doerr, Special Master. (Copies mailed to all counsel and all plaintiffs) (R. 53)

September 29, 1955

Filed Resistance of France, France & Nady, James R. McManus and Allan R. Shepherd to motion to remove attorneys and application by attorneys for affirmative relief, with proof of service. (R. 54)

September 29, 1955

Filed order that first meeting of attorneys for all parties shall be held with the Special Master at Room 725 Davenport Bank Building, Davenport, Iowa, on October 10, 1955, at 10:30 a.m., Edward A. Doerr, Special Master. (Copies mailed to all counsel and all plaintiffs.)

September 30, 1955

Filed motion of Seth Gooder, Joseph P. Condon and Lloyd Drexler for leave to intervene with proof of service. (R. 64)

October 3, 1955

Filed order for submission of motion for leave to intervene on written statements to be furnished by October 12, 1955, Edward A. Doerr, Special Master. (Copies mailed to all counsel and all plaintiffs and to attorneys for intervenors.)

October 3, 1955

(Abstract of Proceedings before Special Master Doerr on motion of the plaintiffs to remove Attorneys France, France & Nady, James R. McManus and Allan R. Shepherd.)

At 2:00 p.m., Monday, October 3, 1955, the hearing was convened and proceeded as follows:

THE SPECIAL MASTER: The hour of 2 o'clock is at hand. We will consider ourselves convened. Mr. Reporter, will you let the record show that this hearing convened in the Petit Jury Room at the Federal Building in Davenport, Iowa at 2 o'clock p.m. on this 3rd day of October, 1955, and was immediately adjourned to reconvene in the Grand Jury Room, and did so reconvene.

I have some news which will be of interest to you. I received a telephone call from the plaintiff, Mr. Harry Strong, this morning. He told me that he had taken proceedings in the Circuit Court of Appeals for an injunction and stay order, the further particulars of which I am not familiar with, at all. He said that neither he nor any of the plaintiffs would attend the meeting this afternoon. I told him that I took note of the fact. In the absence of any more precise information, we will proceed with this hearing. Are any of the plaintiffs here, or represented by counsel?

MR. McMANUS: Your Honor, I might say that France, France & Nady, and James R. McManus, and Allan R. Shepherd are here in person, and we are the attorneys of record in this case, for the plaintiffs.

THE SPECIAL MASTER: We will take note of that, Mr. McManus. According to the order setting this hearing, the plaintiffs were given the privilege to be represented by counsel of their own choosing, so aside from James R. McManus and Mr. Shepherd, and France, France & Nady, I take it the plaintiffs are neither here nor represented by counsel. The other appearances, Mr. McManus—

MR. McMANUS: (Interposing) Now just a minute, Your Honor. If I may suggest, I think the record should affirmatively show that at this time the plaintiffs are neither here in person, nor are they represented by counsel, other than those that I named, and I ask that the record may so show.

THE SPECIAL MASTER: The record will so show. The other appearances, Mr. McManus, you appear for yourselves, I take it.

MR. McMANUS: Yes, we appear in person, as I said, for ourselves.

THE SPECIAL MASTER: Do you wish to make any opening statement, Mr. McManus?

MR. McMANUS: I think that in view of the entire situation, and with all due deference to Judge Riley and to the Special Master, that I should say that, for the purpose of the record and for the purpose of preserving the rights and interests of ourselves as attorneys, and the plaintiffs also, I am entirely unaware of what proceedings the plaintiffs individually and personally, or through other counsel, may have taken or filed in this case, but I do want to object and protest against a hearing being conducted before the Special Master at this time, for the reason that the order made by Judge Riley on September 21, 1955 appointing the Special Master, among other things, deprived the plaintiffs of their right to a trial by a jury as guaranteed to them in a suit of this kind wherein a jury has heretofore been demanded, in violation of the rights guaranteed them by the 7th Amendment to the Constitution of the United States, and denies to them due process of law as guaranteed to them by the provisions of the 5th Amendment to the Constitution of the United States. And in view of that fact we, as attorneys—and I refer to France, France & Nady and James R. McManus and Allan R. Shepherd—we have an interest in this controversy, both by reason of the terms of our employment and the Federal cases, because of the contingent character of the arrangement for compensation, should raise that question in our own behalves also, and we do raise that question and take the view that the order made by Judge Riley on September 21, 1955 was void because it was in contravention to the rights and interests of both the plaintiffs and their attorneys of record, under the 5th Amendment and the 7th Amendment to the Constitution of the United States.

THE SPECIAL MASTER: There are some argumentative answers to the objection, but argument would be out of place. The objection, if good, would also appear to be premature. But I will make the short answer that the objection is overruled.

MR. McMANUS: Very well.

Now do you want to note any other appearances, Your Honor?

THE SPECIAL MASTER: The other appearances are by counsel present as observers only, by the limitations of the order. If you would like to have the other appearances noted, I would be very glad to have it done.

MR. McMANUS: I think they should be, Your Honor.

Thereupon it was made to appear the one or more of the attorneys representing the corporate defendants were present as observers but took no part in the proceedings.

Also present were Arthur G. Field of Chicago, Illinois, attorney for the Intervenors Seth N. Gooder, Joseph P. Condon and Lloyd Drexler on their motion filed September 30, 1955; Jake More, Harlan, Iowa; and Joseph P. Condon and Seth N. Gooder of Chicago, Illinois.

Plaintiffs' attorneys of record called the following witnesses, who, being sworn, testified:

Joseph P. Condon

My name is Joseph P. Condon, 208 South LaSalleStreet, Chicago, Illinois. The name of my company is McDougal & Condon, Inc., same address. I have been acquainted for many years with the project on Cedar River sometimes referred to as the Moscow Dam and I have been acquainted with Harry J. Strong of Davenport, Iowa for 14 or 15 years. I have had financial dealings with the First Iowa Hydro Electric Cooperative to the tune of about $85,000, meaning that I have advanced to that Cooperative approximately that sum, for the purpose of furthering the project, its aims and purposes.

I had a conference with Mr. Strong in my Chicago offices on July 25, 1955. He was with Jake More of Harlan, Iowa. Mr. Seth Gooder and Mr. Kelly were also there. Mr. Strong said that he wanted to raise a fund of money to further the litigation in the Iowa Hydro Electric project, the suit pending in this Court as Civil No. 1-224. He wanted to raise $25,000 to show that he had money to pay for legal fees or litigation to pursue the suit. I gave Mr. More $10,000 for his custody, who later turned it over to Mr. Strong with the understanding that he would raise additional moneys totaling $25,000. I knew Mr. Gooder was going to put in, so Mr. Strong would go back home and get $10,000 from someone in Iowa to make the total of $25,000. At no time was this money to be used for Harry Strong's personal living conditions, and we stipulated that if he did need some personal help or subsistence I would give him additional money other than the money given him this day and this money was solely to be used to pay the lawyers who were handling the litigation, Mr. Nady and Mr. McManus and whoever their associates were. This money was supposed to be held by Mr. More in escrow. Mr. Strong objected to More having the money because he said he was treasurer of the Iowa Hydro Electric and it would insult his honesty and intelligence, or something or other, nevertheless I gave two checks, my check for $5,000 and Lloyd Drexler's check for $5,000, personally to Jake More. Seth Gooder was also to give a check for $5,000. At that time, Mr. Strong was very pleased with his lawyers and expressed satisfaction with the progress of the case. Mr. Strong has never at any time during my association with him and since the commencement of the suit I have mentioned a while ago, expressed any criticism or dissatisfaction with the lawyers that instituted the suit. In fact, I would not have given him the money if there was any disharmony at all. We had the other impression, that everything was harmonious and amicable, and going along fine. Mr. Strong told me that the suit was going along fine and he was satisfied with his lawyers. The first time I actually had known that the plaintiffs were attempting to discharge their attorneys of record was when I came out to Des Moines on September 2, 1955.

I believed Mr. Strong when he told me he wouldn't use any of the $15,000 unless and until the Cooperative had raised an additional $10,000, and I believed him when he represented that he was to use the money only for legal fees. I first be-

came aware that Mr. Strong was using some of this money for his own needs when we came to Des Moines early in September. After a hearing before Judge Riley on September 2, 1955 Mr. Gooder and I went over to the Franklin Hotel to meet with Mr. Strong and the Board. One member was not there. At that time I asked Mr. Strong and the members of the Board and the officers of the Cooperative to return the $15,000. They said they didn't have a full quorum, a full Board, but they would meet on the following Wednesday and send our money back. We wanted to be damn sure they had the money, and Harry Strong told me he had $29,500 in a bank. He didn't tell us what bank it was in, but we were going to get our money back the following Wednesday. I haven't seen Mr. Strong or the money since then. I want the $15,000 that I, Mr. Gooder and Mr. Drexler turned over to Mr. Strong to be deposited in the registry of this Court to be used for the purposes that we intended it to be used and to have the Court impress that fund with a trust, to be paid to the lawyers in the litigation.

Seth N. Gooder

I am Seth N. Gooder, 1247 Deerfield Road, Deerfield, Illinois, a civil engineer. I am President of Gooder Henrichsen Company. I have been interested in the Moscow Dam project for 25 years and have become acquainted with Harry J. Strong, Secretary-Treasurer and General Manager of First Iowa Hydro Electric Cooperative. I was aware of the institution of this action, Civil No. 1-224 in this Court. Over a period of years I have advanced money represented by contract indebtedness and otherwise to First Iowa Hydro-Electric in the approximate amount of possibly $60,000. I saw Harry J. Strong in the offices of McDougal & Condon in Chicago on July 25 or July 26, 1955 and overheard a conversation with Harry J. Strong, the substance of which was that First Iowa needed $25,000 to carry on their litigation. Mr. Condon agreed to put up $5,000, Mr. Drexler $5,000, Mr. Sperry $1,000. I wanted assurance that the balance of the money was subscribed and received before I put up $5,000. The total amount to be raised by First Iowa was $25,000, and that money was to be used solely for this litigation, to be impounded in a special account, and was not to be used for any of Harry Strong's living ex-

penses. On August 1 I sent a check for $5,000 to Harry J. Strong, payable to First Iowa Hydro Electric, after I received advice that the balance of the money to create this fund had been raised. I would not have sent my money if I did not believe the balance of the $25,000 fund had not been raised or if I believed that all of the money would not be utilized for the purpose for which it was originally intended. I believed Harry Strong when he represented that the money would be used solely for the purpose originally intended. The checks made out in Chicago on July 25 were given to Mr. More, who was not to release the checks to Mr. Strong unless the $25,000 was raised. I next saw Mr. Strong on a Sunday in the latter part of August when he came to my home in Deerfield. He said he had in mind to discharge the attorneys so I questioned him about whether he had raised the other $10,000 before he used the money I had mailed to him, and he said that he had raised it. I asked him where the $15,000 or $16,000 was that was raised in Chicago and he told me it was in a bank account in Muscatine. I asked him where the rest of the money was that he raised and he said it was not in that account but was in a safety deposit box in cash in Muscatine, and he said it amounted to $20,000, in addition to the $16,000. I told Mr. Strong I would like to go to Muscatine with him the next day and check the account with him and check the money in the safety deposit box, and Mr. Strong said he would return my $5,000 to me and would mail me a check the next day. I never received the check.

The next time I saw Mr. Strong was at the Court hearing in Des Moines on September 2. After the hearing I went to the Franklin Hotel with Mr. Condon and members of the Board and told them that I felt that the money should be returned and I asked the members of the Board whether they still had the money and they said they did. They said they had $29,500. They said they would take action on the $15,000 on the following Tuesday because one member of the Board was missing. I have never received any part of the $5,000.

* * * * * *

Jake More

My name is Jake More, and I live at Harlan, Iowa, and I have been for many years a lawyer in Iowa. Until recently I was general counsel for First Iowa Hydro Electric Cooperative. I have become acquainted with Harry J. Strong, Secretary-Treasurer and General Manager of the Cooperative. I accompanied him on a trip to Chicago on July 25, 1955 and went with him to the office of McDougal & Condon. My recollection of what transpired then is substantially the same as that to which Mr. Condon and Mr. Gooder testified. I rode back from Chicago with Mr. Strong and told him I felt that the attorneys probably ought to be paid $7,500 to each firm so that they would have money with which to carry on the litigation and take care of their expenses. Mr. Strong thought that was too much and he said he would have no objection to giving each of the firms $5,000, and he said he would do so when he got the money. I met with the Board of First Iowa Hydro Electric Cooperative that night but I didn't tell them that I had two checks for $5,000 in my pocket to save Mr. Strong from embarrassment. On July 30, 1955 I got a telephone call from Harry Strong, who told me he would have the money the next day and that it would be in excess of $30,000. He called me Sunday and said he had the balance of the $25,000. As I recall, he had in excess of $30,000, but he had the additional to make up the $25,000, so I told him I would send the checks with the understanding that $5,000 would go to Nady and France and $5,000 to Mr. McManus. He said he would do that and asked me to mail the checks to Cliff Hakes at Muscatine. I then called Mr. Gooder and told him that Harry had called me and had the balance of the money and Gooder could send his check and he said he would. I mailed to checks I had to Harry Strong on July 31. When he told me he had raised the additional money so as to have the fund of $25,000 on hand I believed him, or I would not have sent him the checks. Prior to the time I mailed these checks to Mr. Strong, he never expressed dissatisfaction with the lawyers that were handling the litigation in Federal Court. He expressed on numerous occasions, either over the telephone or when I would see him, the lawyers were doing a good job and he was satisfied with the work that they were doing, that they were developing a good case. He told me on the train he and one of the attorneys had had a little argument, and an unfortunate incident that both of

them regretted, and the lawyer involved was very sorry about it, but that made no difference, that those things happen, and that had happened, as I understand, some three weeks before we were on the train. But he has always indicated the lawyers were doing a good job, and he was well satisfied with what they were doing.

* * * * *

X. C. Nady

I am X. C. Nady and I live at Tipton, Iowa. I am a member of the firm of France, France & Nady. I have been practicing law in Iowa for 40 years. I am one of the attorneys of record in Civil No. 1-224 pending in this Court. I have been an attorney of record in the litigation since its commencement. I requested permission from the Cooperative to permit James McManus and Allan Shepherd to become associated with my firm in the commencement and prosecution of that suit. They were first contacted by the Cooperative on October 14, 1953. I remember Mr. Strong coming with me to your office, Mr. McManus, in Des Moines in January of 1954. I remember discussing with Mr. Strong then the terms upon which we would accept employment in the litigation. The terms of our employment were that he would not be able to pay us fully as we went along but that he would have sufficient money to maintain us and pay us what was necessary for our office expenses and overhead during the time that we were to spend the greater part of our time to this litigation, and I later entered the meeting where Mr. Strong reported that to the Board, and I think there are minutes in that Board where we were employed on a contingency basis, subject to being paid a reasonable amount as we went along. Thereafter, since our employment, we have discharged our responsibilities to the best of our respective abilities to the plaintiffs in this litigation.

I spent 1,158 hours in 1954 on this litigation, and I would say that a great portion of that time has been in your office in conjunction with briefing and working on your part. I believe we have spent in excess of 80 per cent of our time in 1955 on this litigation. The total amount of time I have spent on this lawsuit since it began would be in excess of 400 days, possibly 450. I have been employed in this litigation 22 or 23 months

altogether. I have a record of our total disbursements, our total out-of-pocket money is in excess of $3,000. This does not include approximately 14,000 miles with our automobile nor compensation for car or anything of that nature. The reasonable value for the use of my car would be 10 cents a mile. Except for Mr. Shepherd's absence from the discovery depositions commencing June 6, to my personal knowledge he has put in approximately the same amount of time that I have in connection with this litigation. While we were taking depositions we called on him numerous times to check various legal holdings and to do research work for us. The disbursements that I mentioned did not include approximately $400 in long distance telephone calls, for which I have not been reimbursed. To my personal knowledge, you, Mr. McManus, have put in approximately the same amount of time that I have in connection with this litigation. You have come to Tipton on several occasions during the last 22 months and spent time there examining books and records of the Cooperative and in doing research work.

I have an opinion as to what would constitute the fair and reasonable value of my services in Iowa during the period I have been engaged as an attorney as compensation for my work on a quantum meruit basis. Considering the responsibility assumed in a case of this size and the various legal problems to be met and the work done, it is my opinion that the services of our firm are worth $100,000.

I heard Mr. More's testimony about raising the balance of the $25,000 fund. I had a conversation in the hotel after the transmittal of the money to Mr. Strong by Mr. More and I told Mr. Strong we felt that now he had gotten the money it should be paid to us since he had got it for that purpose and and that it was actually our money. Mr. Strong stated at that time that he had told Mr. More that he had raised the additional money required as a condition upon his making payment to us, but in fact he had not raised it, and that he had lied to More in getting possession of the money, that is in getting possession of the $10,000 which More sent him July 21. I have never received the $5,000 nor has Mr. France. Mr. Strong just made the blank statement, "I haven't got that money," and I said to him, "Well, didn't you tell Jake that you did have it?" and he said, "Yes, I did, but I didn't have it."

When I said I had spent 400 or 450 days on this litigation I meant that was spent by me alone. It is in excess of that. I have a complete record. I feel I have spent approximately 80 per cent of my time during the last two years, almost, in this action here.

Returning to the conversation between myself, Mr. Strong and you, Mr. McManus, in your office in January, 1954:

"Q. But in that same conversation, after he had spent several days, do you recall me saying this to Mr. Strong, or this in substance, 'In view of the fact that this litigation will be prolonged, you don't have any current assets with which to pay us, I wouldn't want to get into the lawsuit unless I felt that I was protected, and that we lawyers had an interest in the litigation,' or words to that effect?

"A. Yes, I recall that now, Mr. McManus, and I may say at the same time the thing that impressed that upon me was that you related the circumstance where you had been in some labor cases that had been carried on for a considerable length of time, and unless you were sure that you could finally be compensated and have an interest in the case, that you didn't want to get into it.

"Q. And what did he say in response to that statement?

"A. Oh, he said, 'When Jake More and X. here recommends you and tells me you are all right,' he said, 'I have no hesitancy in making you that promise and going along with you on that basis.'

* * * * *

"Q. And that I didn't want in this litigation unless I had an interest in the subject matter of the litigation?

"A. That's right.

"Q. And did he agree to that?

"A. He did.

"* * *

"Q. And with respect to all of the attorneys?

"A. That's right."

James D. France

My name is James D. France, Tipton, Iowa. I am a member of the firm of France, France & Nady. I have spent about 250 days on this litigation from the time of my employment to August 31, 1955. I heard Mr. Nady's testimony, but I personally was not present during those conversations with Harry J. Strong regarding our employment. I think Mr. Nady's estimate of $3,000 out-of-pocket expense is about $500 low. I think our firm has advanced, the two of us, about $3,500. I have an opinion as to the value of Nady's services and my services up to August 31 of this year, considering the amount involved and the responsibility and the amount of time concerned, and that value is $100,000.

I would say that Mr. Shepherd and you, Mr. McManus, have put in approximately the same amount of time as Mr. Nady put in up to the time of the depositions commenced in June of this year. Mr. Shepherd had put in about the same amount of time as Nady up to June 5, and he did some research while discovery procedure was going on. I have an opinion as to the value of Mr. Shepherd's services and your services in Iowa in 1954 and 1955 in connection with this litigation, and that value would be $100,000.

* * * * *

Jake More

I am the same Jake More who testified earlier this afternoon. I have been practicing law in Iowa since June, 1928. General practice, including office and trial work. I heard the testimony of Mr. Nady and Mr. France and am acquainted with those gentlemen and Mr. Shepherd and with you, Mr. McManus. I have been in pretty close contact, almost daily, with all four of you since the litigation began and I am pretty well familiar with the amount of time that the four of you have spent on this lawsuit. I have an opinion as to the reasonable value of the attorneys' services in connection with a litigation of this character in Iowa. Up to August 31, 1955 I was general counsel for First Iowa Hydro Electric Cooperative. In my opinion the fair and reasonable value of the services rendered by France, France & Nady from the commencement of this lawsuit down to August 31, 1955 would be $100,000. I have knowledge with respect to the time Mr. Shepherd and you

have put in on this lawsuit since its inception and I have an opinion as to what would represent the fair and reasonable value of your services in 1954 and 1955 and that figure would be $100,000. From my knowledge and observation and experience, I have an opinion as to whether or not at all times during this litigation the lawyers of record for the plaintiffs have conducted themselves properly in attempting to look after the lawsuit to the best of their ability. Since before this case was filed at least one of the four gentlemen that you have referred to have consulted with me weekly, almost weekly, and sometimes several times each week, on many occasions several times each day, and I know that since the case was filed that the four lawyers involved have spent a greater part, and many weeks and sometimes months all of their time in the prosecution of this case, and I have from time to time talked to the officers and directors of the First Iowa Hydro Electric Cooperative with respect to whether or not they are satisfied with the services of their attorneys of record, and they have told me that the services were satisfactory.

* * * * *

Ralph U. Heninger

My name is Ralph U. Heninger and I have been practicing law in Iowa since October, 1932. I am a member of the firm of Betty, Neuman, Heninger & Van Der Kamp in Davenport. I am familiar with the fair and reasonable value of attorneys' services for office and court work in Iowa. I know both you and Mr. Shepherd. I practiced in Des Moines for about six years before coming to Davenport. I know Mr. Nady and Mr. France. I have heard their testimony. The fact that this is an anti-trust suit under the Clayton and Sherman Acts, and the amount involved, would influence and affect my judgment with respect to fees of lawyers involved in such a lawsuit as well as the responsibility of those charged with looking after it.

I would say the fair and reasonable value of the services of Mr. France and Mr. Nady on the basis of this case would be a minimum of $150 a day up to $200 a day for services performed by each of them in active work on the case. I would say the charge would be the same whether it was court work or office work.

* * * * *

Allan R. Shepherd

My name is Allan R. Shepherd and I live in Des Moines, Iowa. I have heard the testimony given by Mr. Nady and Mr. France about the time the four of us spent in connection with this litigation, and my testimony would be substantially the same with respect to the amount of time each of us has put in on the case since we were employed, down to August 31, 1955. I believe I have put in about 30 days less than Mr. Nady has, but during that 30 days I also did some research and briefing, although I wouldn't have any accurate record as to how much time that was.

Referring to January, 1954 when Mr. Strong was in our office negotiating and attempting to get us into the lawsuit, you insisted that we must have some assurance that we would not be deserted until we had a chance to carry this to a successful conclusion, but we recognized, of course, that our client would have the ultimate control of any settlement and he would be bound, of course, by your advice. I think that's the gist of it. I recall that you warned Mr. Strong that we must have an interest, but that it would be subject to his rights, subject to his overriding control in the event of settlement. I mean plaintiff's overriding control. I speak of him because he was the most active of our clients.

"Q. And when I told Mr. Strong of my previous experience and that it would be necessary that we have an interest in the litigation to insure our payment, subject to the paramount right of the plaintiffs to control any settlement, what did Mr. Strong say in that connection, in substance?

"A. He assured us that we would be protected; that he and his counsel, general counsel, Mr. More, would always respect our rights.

"Q. And did he say that the suggestion I made would be agreeable to him?

"A. That's right.

"Q. And have we proceeded and acted in that manner?

"A. We have."

We have out-of-pocket expenses amounting to several hundred dollars for which we have never been reimbursed and we have received no part of the $5,000 that was to be paid to us out of the $25,000 trust fund. I believe that the opinion of Mr. France and Mr. Nady with respect to our total fee is a fair estimate.

Following the conclusion of the testimony there was a colloquy between Special Master Doerr and Attorney McManus and the Special Master announced his intention to sustain the motion to discharge counsel, indicating that in his judgment the plaintiffs had the privilege of discharging their attorneys, regardless of fault and regardless of the contingent nature of the employment, but that said privilege and right was subject to conditions, and then stated:

> "That order will, however, be conditioned. The condition will be the payment to James R. McManus and Allan R. Shepherd jointly the sum of $100,000 as fees, and upon the payment to James D. France and Xavier C. Nady of the sum of $100,000 for fees.
>
> "There will be a condition to that condition, however. In view of the relationship of trust and confidence between attorney and client I will order that the matter can be reopened upon the application of the plaintiffs for the sole purpose of showing their inability to comply, in whole or in part, with the condition for the payment of the $200,000 total sum. That will be the substance of the order, and of course copies will be transmitted to the interested parties."

The Special Master then stated that he proposed to enter a formal order, and the hearing was thereupon adjourned.

October 5, 1955

Filed Order re Motion of Plaintiffs for leave to remove France, France & Nady and James R. McManus and Allen H. Shepherd as attorneys for plaintiff herein and re resistance to motion to remove attorneys and application by attorneys for affirmative relief, Edward A. Doerr, Special Master (Copies mailed to all plaintiffs and all counsel). (R. 70)

October 5, 1955

Filed opinion of Edward A. Doerr, Special Master, re October 3, 1955 hearing (Copies mailed to all plaintiffs and all counsel). (R. 72)

October 5, 1955

Filed Order that plaintiffs may submit written statements re Motion for Leave to Intervene by October 12, 1955, Edward A. Doerr, Special Master. (Copies mailed to all plaintiffs and all counsel). (R. 76)

October 6, 1955

Filed Order filed on Oct. 3, 1955, in the U. S. Court of Appeals for the Eighth Circuit denying motion for leave to file petition for mandamus and injunction for want of jurisdiction. (R. 77)

October 10, 1955

Filed affidavit of prejudice by Harry J. Strong against Riley, J. (R. 78)

October 10, 1955

(Abstract of proceeding before Special Master re deposition of Harry J. Strong.)

At 10:30 o'clock a.m., on October 10, 1955, Mr. Nady and Mr. McManus appearing for plaintiffs of record, and all of the defendants appearing by one or more of their attorneys of record, the following proceedings were had before Edward A. Doerr, Special Master.

Master Edward A. Doerr, presiding, stated that the meeting was called in advance of the resumption of discovery depositions at 11:00 a.m., for the purpose of complying with the rules, getting acquainted and ascertaining how to speed up the proceedings. No objections were made by plaintiffs or their attorneys of record to the proceeding before the Special Master at this time. Tr. 1920-1928)

The meeting was recessed until 11:00 a.m. and was then reconvened, when the following proceedings were had:

"THE MASTER: Gentlemen, I consider that we are convened.

Has it been the practice after adjournment to recite the entry of appearances again?

MR. WALKER: We have not been doing that.

THE MASTER: I do not see any reason for it unless someone wants it.

MR. STRONG: I think a roll call would be in order.

THE MASTER: Mr. Strong has asked that a roll call be made of all appearances. We will do it. We will start immediately on the Reporter's left." (Tr. 1929)

The roll call disclosed that one or more of the attorneys of record for all defendants were present. (Mr. X. C. Nady and Mr. J. R. McManus announced their appearance as attorneys of record for the plaintiffs. (Tr. 1930-1931)

In addition to the parties and attorneys present before the Master, Mr. A. L. Elston, of Rock Island, Mr. Glenn Elston, of Rock Island, and Richard Hoyt, of Davenport, were also present as interested observers.

THE MASTER: If there is nothing else, then, we will then resume with the taking of the deposition of Mr. Harry J. Strong, one of the Plaintiffs.

"MR. STRONG: Mr. Master, I am Harry J. Strong, Plaintiff, the witness called in this deposition.

I am here unrepresented by counsel.

The Court has been on notice since September 2nd, that we have discharged our counsel.

The Court has seen fit to freeze us in that position, and under those circumstances, and without counsel, I am going to decline to testify further.

I want the record to show that there was filed in the Court this morning at 9:35 A. M., an affidavit of prejudice.

I wish the record to further show that we request that any further action in this case be deferred until that matter is disposed of.

THE MASTER: There are argumentative answers to what you have asserted, Mr. Strong, but this is not the time for argument.

MR. STRONG: I shall leave the Court room to refuse to testify without counsel. (Tr. 1934)

"THE MASTER: I advise you to testify.

MR. STRONG: And I shall decline.

THE MASTER: I urge you for your own good to testify. You may be held in contempt for refusal to testify.

MR. McMANUS: Let the record show that J. R. McManus and X. C. Nady, attorneys of record for the Plaintiffs in this proceeding are here and ready to proceed.

MR. LARNED WATERMAN: Before Mr. Strong leaves the room, he should be advised that—

MR. MARKMAN: Let the record show that at this moment Harry J. Strong has walked out of the room.

MR. LARNED WATERMAN: I will complete the advice which was directed to Mr. Strong, and which he declined to hear by arbitrarily leaving the room, that one of the Defendants, Iowa-Illinois Gas and Electric Company, shall seek the sanctions permitted by Rule 37 as soon as motions can be properly prepared to be submitted to the Special Master.

MR. McMANUS: That may be part of the strategy, I do not know. (Tr. 1935)

"MR. WALKER: In view of the circumstances, Mr. Doerr, the fact that we no longer have a witness at this point, I am wondering if you have suggestions as to how we might proceed?

Now, I might say at the outset that in addition to Mr. Strong being cited for or noted for deposition, all of the other Plaintiffs have been noted by the Defendant Union Electric Power Company.

Assuming that we are not going to be able to get Mr. Strong in here at this time, I would assume that it might be in order for you to give consideration to summary notice to some of the other Plaintiffs for the taking of their depositions, pending what other action might be taken by the Defendants as the result of Mr. Strong's most recent action.

MR. LARNED WATERMAN: Before going further, Mr. Doerr, I would like the record to show that both of the Messrs. Elston who noted their presence as observers are still in the room, having not left with the witness, Harry J. Strong. Mr. Honts has, however, left.

THE MASTER: That will be noted. (Tr. 1936)

"MR. WALKER: May I suggest, Mr. Doerr, in light of the developments this morning, that it might be well for us to adjourn at this time until 2:00 o'clock this afternoon to give the defense counsel an opportunity to discuss the developments and determine what action we would prefer to take.

THE MASTER: I believe a recess would be in order. We will recess until 2:00 o'clock this afternoon." (Tr. 1937)

The proceedings before the master reconvened at 2:00 o'clock p. m.

No objection was made by plaintiffs or their attorneys to the appointment of the Special Master or the order of reference of September 21, 1955, at the hearing on October 10. At 2:00 p.m. that same day the hearing reconvened before the Special Master. The appearances for plaintiffs and defendants were noted as being the same as at the morning session. Strong remained absent. After discussion, the proceedings were again adjourned until 5:00 p.m. on the same day, at which time the following proceedings were had:

The motion of the defendants to dismiss was presented to the Master and service thereof acknowledged by Mr. McManus, as attorneys for plaintiffs, the same being the motions to dismiss filed with the clerk on October 11, 1955, by the defendant Union Electric Power Company and joined in by the other defendants. Mr. McManus on behalf of plaintiffs requested sufficient time to resist the motion to dismiss, and following a general discussion with reference to the time and place of hearing thereon it was agreed the matter might be set for hearing on Friday, October 21, 1955, at 11:00 p.m., in Davenport, Iowa, at Room 725 of the Davenport Bank Building. (TR. 1944-1955)

Following a further discussion the hearings that day were concluded by the statement of the Master of record as follows:

> "THE MASTER: Let the record show that following the filing of a motion to dismiss by the defendants, the Master announced that in consequence of the failure and the refusal of the Plaintiff Strong, to testify, and in consequence of his leaving the hearing room, the taking of his deposition necessarily recessed to be continued, if at all, after ruling on the motion to dismiss, and the affidavit of prejudice so far as ruling on that is within the function of the Special Master." (Tr. 1957)

October 10, 1955

Filed with Special Master motion of defendant Union Electric Power Co. to dismiss and joinder by other defendants, and affidavit of service. (Filed with Clerk October 11, 1955.) (R. 82)

October 11, 1955

Filed amendment to order of October 5, 1955, adding "Defendants took no part in the hearing which was ex parte as to them." Edward A. Doerr, Special Master. (Copies mailed to all plaintiffs and all counsel.) (R.86)

October 11, 1955

Filed order that motion to dismiss shall be heard on October 21, 1955, at 11:00 a.m., Edward A. Doerr, Special Master. (Copies mailed to all plaintiffs and all counsel.)

October 13, 1955

Filed order that motion for leave to intervene is denied, Edward A. Doerr, Special Master. (Copies mailed to all plaintiffs, all counsel and counsel for intervenors.) (Said order is set out below.)

Reference is made to the orders dated October 3rd, 1955, and October 5th, 1955, providing for the submission, upon brief, written statements by counsel, of the MOTION FOR LEAVE TO INTERVENE filed by Seth Gooder, Joseph P. Condon and Lloyd Drexler. Statement has been filed by defendants in opposition to the motion. No statement has been filed by movants or by plaintiffs. The time fixed for submission of such statements has expired.

It appears from the motion and the proposed COMPLAINT OF INTERVENTION attached thereto that the motion does not come within the terms of the governing rule, being rule 24 of the Federal Rules of Civil Procedure.

The MOTION FOR LEAVE TO INTERVENE is therefore denied.

October 14, 1955

Filed order for hearing on Affidavit of Prejudice at Des Moines, Iowa, on Friday, October 21, 1955, at 2:00 p.m., Riley, J. (Copies mailed to all plaintiffs and their attorneys of record.)

October 17, 1955

Filed order changing date for hearing on Motion to Dismiss to October 28, 1955, at 11:00 a.m., at 725 Davenport Bank Building, Davenport, Iowa, Edward A. Doerr, Special Master. (Copies mailed to all plaintiffs and all counsel.)

October 17, 1955

Filed motion by plaintiffs entitled Motion to Expunge a Document Called Deposition of Harry J. Strong. (Said motion is set out below.)

Now comes FIRST IOWA HYDRO ELECTRIC COOPERATIVE, a corporation, HARRY J. STRONG, HARRY IMEL, FRANK A. E. GILLMOR, P. H. NABER and CARL J. MITZNER, individual plaintiffs in this action, the individual plaintiffs being all the members of the Board of Directors of First Iowa Hydro Electric Cooperative, the corporate plaintiff, and state unto the Court as follows:

1. That First Iowa Hydro Electric Cooperative is a corporation organized under, and existing by virtue of the laws of Iowa, and maintaining its principal office at Muscatine, Iowa.

2. That Frank A. E. Gillmor is President of the First Iowa Hydro Electric Cooperative and also a member of the Board of Directors of said Cooperative.

3. That Carl J. Mitzner is Vice-President of the First Iowa Hydro Electric Cooperative and also a member of the Board of Directors of said Cooperative.

4. That Harry J. Strong is Secretary-Treasurer of said Cooperative and also a member of the Board of Directors of said Cooperative.

5. That Harry Imel is a member of the Board of Directors of said Cooperative.

6. That P. H. Naber is a member of the Board of Directors of said Cooperative.

7. That a certain document called "Deposition of Harry J. Strong" is a document of 32 volumes and now containing 1957 pages of reported testimony and Court action; that the entire document "Deposition of Harry J. Strong" is a document taken in Open Court and under the rules of Open Court of United States Courts.

8. That in the reported transcription of said document, "Deposition of Harry J. Strong," taken by Eulass & Company, Court Reporters, 54 West Randolph Street, Chicago, Illinois,

there are a minimum of three instances where one of the attorneys for the defendants makes the statement "This is off the record," which follows in the transcribed copies (here follows discussion off the record); that the instances of the off the record discussions are out of the presence of the plaintiffs of this action; that the document, "Deposition of Harry J. Strong," because of discussions off the record which are unreported, is not a true and correct copy of all proceedings in this matter.

WHEREFORE, plaintiffs pray that a document, "Deposition of Harry J. Strong," be expunged from the record.

FIRST IOWA HYDRO ELECTRIC COOPERATIVE,
By HARRY J. STRONG,
Its Secretary-Treasurer.
F. A. E. GILLMOR,
CARL J. MITZNER,
HARRY J. STRONG,
HARRY IMEL,
P. H. NABER,
Plaintiffs.

October 17, 1955

Filed motion by plaintiffs entitled Motion to Expunge From the Record Order Dated October 5, 1955, said Order Pertaining to a Hearing on October 3, 1955. (R. 86)

October 17, 1955

Filed motion by plaintiffs entitled Motion to Expunge From the Record an Order Dated October 11, 1955, and Order Pertaining to Motions to Dismiss and Hearing on Affidavit of Prejudice. (Said motion is set out below.)

Now comes FIRST IOWA HYDRO ELECTRIC COOPERATIVE, a corporation, HARRY J. STRONG, HARRY IMEL, FRANK A. E. GILLMOR, P. H. NABER and CARL J. MITZ-

NER, individual plaintiffs in this action, the individual plaintiffs being all the members of the Board of Directors of First Iowa Hydro Electric Cooperative, the corporate plaintiff, and state unto the Court as follows:

1. That First Iowa Hydro Electric Cooperative is a corporation organized under, and existing by virtue of the laws of Iowa, and maintaining its principal office at Muscatine, Iowa.

2. That Frank A. E. Gillmor is President of the First Iowa Hydro Electric Cooperative and also a member of the Board of Directors of said Cooperative.

3. That Carl J. Mitzner is Vice-President of the First Iowa Hydro Electric Cooperative and also a member of the Board of Directors of said Cooperative.

4. That Harry J. Strong is Secretary-Treasurer of said Cooperative and also a member of the Board of Directors of said Cooperative.

5. That Harry Imel is a member of the Board of Directors of said Cooperative.

6. That P. H. Naber is a member of the Board of Directors of said Cooperative.

7. That said Order should be stricken from the record, because on October 10th, 1955, plaintiff, Harry J. Strong, filed an Affidavit of Prejudice with the Court; that said Affidavit of Prejudice was addressed to the Clerk of the Court.

8. That the Court had no jurisdiction in this matter after the filing of said Affidavit of Prejudice at 9:35 a.m. on said October 10th until the Court had acted upon the Affidavit of Prejudice.

9. That the Order of October 11th, 1955, was issued after the filing of the Affidavit of Prejudice, but before the Court had acted on said Affidavit of Prejudice.

10. That a second part of said Order October 11, 1955, pertains to a hearing on the Affidavit of Prejudice; that an Affidavit of Prejudice is not a Motion or a Complaint before the Court, but a mere fact—an affidavit.

11. That an Affidavit of Prejudice is an affidavit filed as a matter of right. That the only one allowed to do anything on an Affidavit of Prejudice is the United States Judge who is allowed to examine it as to form, and the Clerk who is to carry out its direction.

12 That there is no precedent at law for any hearing on said Affidavit of Prejudice; that said Order is in error in ordering a hearing.

13. That said Order is not an Order of the Court, but is in reality, an Order of the defense counsel as may be more clearly found by reading completely Volume 32 of a document called "Deposition of Harry J. Strong" wherein the defense counsel designated the thought in the Order, and the Master merely signed the Order.

WHEREFORE, plaintiffs pray that the aforesaid Order of October 11, 1955, be expunged from the record.

FIRST IOWA HYDRO ELECTRIC COOPERATIVE,
By HARRY J. STRONG,
Its Secretary-Treasurer.
F. A. E. GILLMOR,
CARL J. MITZNER,
HARRY J. STRONG,
HARRY IMEL,
P. H. NABER,

October 17, 1955

Filed motion of plaintiffs entitled Motion to Expunge an Order of Judge William F. Riley dated October 14, 1955, in Reference to Affidavit of Prejudice. (Said motion is set out below.)

Now comes FIRST IOWA HYDRO ELECTRIC COOPERATIVE, a corporation, HARRY J. STRONG, HARRY IMEL, FRANK A. E. GILLMOR, P. H. NABER and CARL J. MITZNER, individual plaintiffs in this action, the individual plain-

tiffs being all the members of the Board of Directors of First Iowa Hydro Electric Cooperative, the corporate plaintiff, and state unto the Court as follows:

1. That First Iowa Hydro Electric Cooperative is a corporation organized under, and existing by virtue of the laws of Iowa, and maintaining its principal office at Muscatine, Iowa.

2. That Frank A. E. Gillmor is President of the First Iowa Hydro Electric Cooperative and also a member of the Board of Directors of said Cooperative.

3. That Carl J. Mitzner is Vice-President of the First Iowa Hydro Electric Cooperative and also a member of the Board of Directors of said Cooperative.

4. That Harry J. Strong is Secretary-Treasurer of said Cooperative and also a member of the Board of Directors of said Cooperative.

5. That Harry Imel is a member of the Board of Directors of said Cooperative.

6. That P. H. Naber is a member of the Board of Directors of said Cooperative.

7. That said Order is contrary to the law as established by the United States Courts in Affidavits of Prejudice, and more particularly that law as laid down in Berger v. U.S.; 255 US 22.

WHEREFORE plaintiffs pray that said Order be expunged from the record and that the Court comply with the dictates of the Supreme Court of the United States as outlined in Berger v. U.S.; 255 US 22.

FIRST IOWA HYDRO ELECTRIC COOPERATIVE,
By: s/ HARRY J. STRONG,
Its Secretary-Treasurer.
F. A. E. GILLMOR,
CARL J. MITZNER,
HARRY J. STRONG,
HARRY IMEL,
P. H. NABER.

October 17, 1955

Filed plaintiffs' Resistance to defendants' Motion to Dismiss and Application by plaintiffs for Affirmative Relief. (R. 89)

The Resistance was 14 legal pages long and attached thereto were 110 legal pages of exhibits which included among other things:

(a) Copy of motion by plaintiffs in the Court of Appeals for the Eighth Circuit for Leave to File Petition for Mandamus and Injunction and for Temporary Order Staying Proceedings (denied by said Court on October 3, 1955. R. 77);

(b) Copy of Petition for Writ of Mandamus and for Injunction and for Temporary Order Staying Proceedings, filed by all plaintiffs and verified by all individual plaintiffs, October 2, 1955 at Davenport, Scott County, Iowa, and Exhibits "A" through "U" and "1" through "4" attached thereto. Exhibit "D" attached thereto was entitled "Petition to intervene on rule to show cause on the motion of attorneys France, France & Nady and J. R. McManus and Allan R. Shepherd to quash the entry of appearance of the law firm of Bell, Farrar and Scott."

Paragraph 9 of said Petition for Writ of Mandamus alleged as follows:

"That in the month of August, 1955 all of your petitioners in Civil suit No. 1-224 before the United States District Court, Southern District of Iowa, Davenport Division, lost faith in their counsel of record."

Paragraph 28 of said Petition for Writ of Mandamus alleged as follows:

"That on the 30th day of September, A.D. 1955, in the afternoon thereof, your petitioners received through the mail, a copy of an Order from the Special Master setting a hearing on plaintiffs' Motion to remove the attorneys of record, Exhibit "H", said hearing being set for 2:00 o'clock P.M. October 3, 1955 and granting the privilege to the defendants in Civil action No. 1-224 to be

present for said hearing, a copy of this Order being attached hereto and made a part hereof and hereinafter referred to as Exhibit "R"."

Paragraph 46 of said Petition for Writ of Mandamus alleged as follows:

"That your petitioners have consistently attempted to work out the differences to allow a fast conclusion of this matter and in fact did hire an attorney to talk with the United States District Judge involved and that he was instructed by your petitioners that he had the power to work out any solution with the attorneys other than giving way the cause of action to the attorneys; that it was reported back by said attorney that the differences seemed irreconcilable and that it was upon the suggestion of this attorney that the Motion to Remove Counsel was prepared and submitted to the Court, Exhibit "H"; that your petitioners have constantly requested acts of the Court which they felt would protect their rights, but in all instances have been turned down as will be more clearly found in exhibits;"

Exhibit "I" attached to said Petition for Mandamus is as follows:

September 19, 1955

Hon. Wm. F. Riley
U. S. District Judge
U. S. Court House
Davenport, Iowa

Re: First Iowa Hydro Electric Cooperative, et al,

vs: Iowa-Illinois Gas & Electric Co., et al

Dear Sir:

Please be advised that the plaintiffs have filed a motion in the above entitled case asking leave to remove FRANCE, FRANCE & NADY and James R. McManus and ALLAN SHEPHERD as attorneys of record for the plaintiffs. In view of the fact that this Court had ordered the depositions to continue on October 3, 1955, the plaintiffs would like to have this motion disposed of as soon as possible.

The plaintiffs are not represented by counsel in this matter and notice of the hearing of this motion will have to be served upon the plaintiffs individually.

Very truly yours,

HARRY J. STRONG
Secy-treas. 1st Iowa
Hydro Electric Cooperative
1011 East High
Davenport, Iowa

Exhibit "J" attached to said Petition for Mandamus is as follows:

United States District Court
for the
Southern District of Iowa
Des Moines 9, Iowa

At Davenport, Iowa
Sept. 20, 1955

William F. Riley
Judge

Harry J. Strong,
Secretary-Treasurer,
1st Iowa Hydro Electric
Cooperative,
1011 East High,
Davenport, Iowa

Dear Sir:

I have your letter of Sept. 19th, asking for an early assignment of your motion for leave to remove counsel. (which I received Saturday).

Present commitments require our presence in Des Moines, on Thursday and Friday. Our Creston, Council Bluffs, Ottumwa and Des Moines terms follow each other beginning next Monday, Sept. 26th. At the first opportunity when notice can be given, the matter will be set.

If you contemplate any action concerning your deposition now scheduled for resumption at Davenport on Oct. 3d, it will be handled through the master.

Very truly yours,

/s/ W. F. Riley
U. S. District Judge.

cc:

F. A. E. Gillmor
Carl J. Mitzner
P. H. Naber
Harry Imel
Attys. France, France & Nady
Jas. R. McManus & Allan Shepherd.

Exhibit "M" attached to said Petition for Mandamus is as follows:

First Iowa Hydro Electric Cooperative
Muscatine, Iowa

September 23, 1955

Hon. Edward A. Doerr, Special Master
United States District Court
Southern District of Iowa
Davenport Division
Davenport, Iowa

Dear Special Master:

We are in receipt of various Orders concerning the case of First Iowa Hydro Electric Co-operative et al; vs. Iowa-Illinois Gas and Electric Company. In an Order issued by Judge Riley on September 20th, 1955, the Judge stated as follows:

'If you contemplate any action concerning your deposition now scheduled for resumption at Davenport on October 3rd, it will be handled through the Master.'

Since September 16th, 1955, the plaintiffs in this action have filed a Motion to Remove Counsel and inasmuch as that Motion has not been heard, it is respectfully requested that that Motion be taken care of at the earliest convenience of the Court and that Depositions be postponed until such time as the Court has disposed of the Motion and new counsel has been allowed adequate time to prepare to proceed in this matter. Inasmuch as the Order of Appointing a Special Master signed by Judge Riley on the 21st day of September, 1955 has referred

this matter to you, it is respectfully requested that the Depositions scheduled to resume on October 3rd be postponed until the Motion for Leave to Remove Counsel is disposed of and until such time as new counsel has an opportunity to prepare themselves, that they may adequately try the issues in this matter. As you undoubtedly know, the Deposition of Harry J. Strong is sealed and it is impossible for new counsel to adequately prepare for this case until the above Motion filed September 16th, 1955 for Leave to Remove Counsel is disposed of and new counsel is engaged and is allowed opportunity to acquaint themselves with the proceedings to date. In requesting this delay at this time and in also requesting that an early hearing be had on the Motion for Leave to Remove Counsel, First Iowa would like to reserve the right or the right of counsel that will be engaged to make any check which may be necessary upon qualifications of any appointments which are made during this interim when First Iowa is unrepresented by counsel.

Yours very truly,

/s/ H. J. Strong
Harry J. Strong, Secretary and Treasurer
First Iowa Hydro Electric Cooperative

October 20, 1955

Filed motion of individual plaintiffs entitled "Motion in Resistance to the Substitution of Any Party Plaintiff." (Summary of Motion)

The motion, executed and verified on October 20, 1955 by Harry Imel, on behalf of all individual plaintiffs, recites the institution of an action for involuntary bankruptcy against the corporate plaintiff, the appointment of a Receiver in advance of any adjudication in bankruptcy, and the intention of the corporate plaintiff to deny all alleged acts of bankruptcy and all allegations that the petitioners in bankruptcy constitute creditors of the corporate plaintiff. It further alleges that none of the individual plaintiffs has any bankruptcy proceeding

outstanding against him, that no receiver has been appointed to act for any of the individual plaintiffs, and that unless the court defers any action which would allow adverse interests to gain control of any part of this action to the detriment of the interests of the individual plaintiffs, without a complete adjudication of the rights of the parties affected, the individual plaintiffs will be denied a fair and impartial trial. Included in the prayer for relief is the request that the court refuse to accept any substitution of any party plaintiff until there has been a complete adjudication of the issues of bankruptcy in the bankruptcy suit.

October 21, 1955

(On October 21, 1955, there came on for hearing before Judge Riley at Des Moines, Iowa, for consideration, the affidavit of prejudice which had been filed by Harry J. Strong. Messrs. Nady, McManus and Shepherd were present. The court made the following statement:)

"THE COURT: There was assigned by order for this afternoon consideration of an affidavit of prejudice filed against this court by one Harry J. Strong. I think I shall turn first to it. By its order of October 14, 1955, this court directed that the affidavit of prejudice directed against the judge of this court and filed by the plaintiff here, Harry J. Strong, on his own behalf and purportedly as a representative of all other individual plaintiffs, and as an officer of the First Iowa Hydro Electric Cooperative Association, should come on to be heard today at 2 o'clock, p.m. as to its timeliness and sufficiency. Notice of this hearing was given by mailing a copy of the order to each of the plaintiffs and to their counsel of record, James D. France, Xavier C. Nady, J. R. McManus and Allan B. Shepherd. Such notice has been duly given.

"The affidavit charges that it is the belief of the affiant that the judge 'has personal bias and prejudice against our project, a hydro electric development on the Cedar River.' The rest of the affidavit is devoted to a statement of the reasons for such belief. Section 144 of the United States Code Annotated, Title 28, permits the filing of an affidavit of bias or prejudice when the judge before whom the matter is pending has a personal bias or prejudice either against the parties plaintiff or any of

them, or in favor of adverse parties or any of them. The authorities appear definitely to establish that my power is limited to inquiring into the timeliness and sufficiency of the affidavit. Accordingly, the affidavit has been so examined, and with those limitations. This action was filed February 18, 1954; the affidavit October 10, 1955. The court must find that it is not timely. As to its sufficiency, the affidavit fails to meet the requirements of Section 144 of Title 28 of the United States Code Annotated as to the personal bias or prejudice, since that charged here is against—and I quote—"is against our project" —end of quotation. The affidavit is not sufficient for the added reason that it is not accompanied by a certificate of counsel of record stating that it is made in good faith. The affidavit of Harry J. Strong attached is not such a certificate.

"It is, therefore, ordered and adjudged that the affidavit of bias and prejudice is neither timely nor sufficient, and for the other reasons fails to meet the requirements of Section 144 of Title 28, United States Code Annotated.

"It is, therefore, further ordered that the proceedings in this cause shall be continued as though such affidavit had not been filed. An exception is granted to those who deem themselves adversely effected by this ruling. I am going to sign this ruling now in open court this 21st day of October, 1955."

October 21, 1955

Filed Ruling and Order on Affidavit of Prejudice, entered order that Affidavit of Prejudice is not timely or sufficient and for other reasons fails to meet requirements of Section 144, Title 28, U. S. C. A.; that proceedings be continued as though affidavit had not been filed, Riley, J. (Copies mailed to all plaintiffs, their attorneys of record, all counsel for defendants and to Special Master.) (R. 102)

October 24, 1955

Filed Order postponing hearing on Motions to Dismiss to Nov. 7, 1955, at 11:00 o'clock a.m. at 725 Davenport Bank Building, Davenport, Iowa. (Copies mailed to all plaintiffs, their attorneys of record, attorneys of record for defendants and Clay LeGrand.)

October 24, 1955

Filed Order that hearing will be held at 930 Davenport Bank Building, Davenport, Iowa, on October 28, 1955, at 10:30 a.m. re entry of proposed form of order. (Copies mailed to all plaintiffs and their attorneys of record.) (Said order is set out below:)

This order is made on my own initiative.

Attached hereto marked "Exhibit A" and hereby made a part hereof is a form of proposed order.

A hearing will be held by me at 930 Davenport Bank Building, Davenport, Iowa, on October 28th, 1955, at 10:30 o'clock a.m. to determine whether I shall make an order substantially in the form of the proposed order, Exhibit A. Plaintiffs are required to appear at said hearing and show cause, if any there be, why such order shall not be made. In the event that plaintiffs shall fail so to appear, such order will be made.

This order shall be served by the Clerk by mail upon plaintiffs by serving their attorneys of record and plaintiffs themselves.

Dated October 24th, 1955.

EDWARD A. DOERR,
Special Master.

(The "Exhibit A" attached to the Order is substantially the same as the order reproduced at R. 103.)

October 28, 1955

(Abstract of proceedings before Special Master re proposed order to strike *pro se* documents.) On October 28th there came on before the Special Master for hearing on his Order to Show Cause of October 24th the question as to whether or not the five documents filed on October 17th as set forth above and which were not signed by any of the attorneys of record or of counsel should be stricken from the files. At this hearing attorneys of record appeared for plaintiffs, but none of the plaintiffs appeared in person, nor did any of the representatives or officers of the cooperative appear.

James R. McManus, attorney for plaintiffs, made the following objection:

"We object and protest to any action taken by the Special Master or any hearing being held before the Special Master for the reason that the order made by Judge William F. Riley on September 21, 1955, appointing a Special Master, was void; that the Special Master has no jurisdiction, power or authority to proceed, or take any action or proceedings, for the reason that the order made by Judge Riley on September 21, 1955 constituted an abuse of discretion on the part of the judge and, among other things, deprived the plaintiffs and these attorneys of record for the plaintiffs of their right to a trial by jury as guaranteed to them in a suit of this kind, wherein a jury has heretofore been demanded, in violation of the rights guaranteed to them by the Seventh Amendment to the Constitution of the United States; and the special order and procedings also denies to them due process of law and deprives them of due process of law, as guaranteed to them by the provisions of the Fifth Amendment to the Constitution of the United States. And in view of that situation, in behalf of the attorneys of record and the plaintiffs as well, we raise that question in our own behalf and in behalf of the plaintiffs because we take the view that Judge Riley's order of September 21, 1955, appointing a Special Master, was void because it impinged the rights and interests of the plaintiffs and their attorneys of record under the Fifth Amendment and the Seventh Amendment of the Constitution of the United States. I make that objection, Mr. Special Master, simply for the purpose of preserving the record, and would like to have the record show that we do urge that objection at this time.

SPECIAL MASTER DOERR: The objection is overruled. If you care to take further part in the proceedings, why, that can be done without prejudice to the objections you have asserted."

(Tr. of "Proceedings Before Special Master Edward A. Doerr, on Order to Show Cause at 930 Davenport Bank Building, Davenport, Iowa, on Friday, October 28, 1955, at 10:30 o'clock a.m.," Page 5.)

October 28, 1955

Filed order by Special Master Edward A. Doerr directing, among other things, that plaintiffs' motions specified therein be physically removed from the court files. (Copies mailed to all plaintiffs and attorneys of record and to attorneys of record for defendants.) (R. 103)

November 4, 1955

Filed order that hearing on motions to dismiss of defendants be continued to November 18, 1955, at 11:00 a.m., Edward A. Doerr, Special Master. (Copies mailed to all plaintiffs, their attorneys of record and attorneys of record for defendants.)

November 18, 1955

(Abstract of proceedings before Special Master on defendants' motion to dismiss.) On November 18, 1955, there came on before the Special Master for hearing defendants' motion to dismiss. James R. McManus and James D. Frances, attorneys of record for plaintiffs, appeared and repeated the same objections to any action or proceeding before the special Master as were urged by Mr. McManus at the hearing on October 28, 1955. The objection was overruled by the Master. The following proceedings then took place:

"MR. HARRY J. STRONG: Harry J. Strong, appearing as an individual plaintiff and as representing the other four individual plaintiffs, F. A. E. Gillmor, Carl J. Mitzner, Harry Imel, P. H. Naber; and, as well, representing the First Iowa Hydro Electric Cooperative only so far as that which will not conflict with any order of the Court or presumption that a receiver's counsel may speak only for the cooperative. We question that anyone can substitute the cooperative, First Iowa Hydro Electric Cooperative; meaning, in other words, we question the right of any court or anyone substituting for that plaintiff.

"SPECIAL MASTER DOERR: Your recitation of your appearance will be noted, Mr. Strong

"SPECIAL MASTER DOERR: The privilege to appear in person or on behalf of the First Iowa Hydro Electric Cooperative is not to be understood as granted by reason of the noting of your recited appearance."

(Tr. 3-4, Master's Exhibit 4.)

"MR. WALKER: I would like to move the Special Master that you disregard the appearance of Harry J. Strong on behalf of himself or the plaintiff First Iowa Hydro Electric Cooperative or any of the other individual plaintiffs, for the reason that all of the plaintiffs are here represented by counsel; and for the further reason that Mr. Strong's appearance on behalf of others would appear to be irregular, in that he is not a member of this court—

"MR. McMANUS: (Interposing)—Of the bar.

"MR. WALKER: (Continuing)—Of the bar.

"MR. STRONG: Mr. Master, I would like to have the record state that on September 1, 1955, the First Iowa Hydro Electric Cooperative and five individual plaintiffs, including myself, discharged the attorneys of record, having lost faith in that counsel. And we still have lost faith. We believe that since the 2nd day of September, when the Court was given notice of that action, the Court has seen fit to freeze us in a position where we have been unable to get counsel. I would like to have the record show that on Monday of this week I appeared before the Special Master, personally, and because of the orders of this Court or the Master refuses me, as an individual, or any of the other individual plaintiffs, the right to file anything in Court, and directs the Clerks of Courts not to receive anything, that I have attempted all week to get counsel to make an appearance, as is provided for in the order of the Master, to clear the way to where we can get counsel of our choosing. I have been unable to do so. It is our opinion we will be unable to get any Iowa attorney or attorneys in this judicial district to handle this matter. I will continue to pursue, as an individual, the effort to get counsel of my choosing—one whom we will have faith in. I feel that I have every right that any counsel

could give me, in appearing in this or any other court of this United States.

"MR. WALKER: I renew my objection, Your Honor.

"SPECIAL MASTER DOERR: Mr. Walker's objection is sustained.

"MR. STRONG: Does that mean, Mr. Master, that I am denied the right to appear here in behalf of myself?

"SPECIAL MASTER DOERR: That does mean that you are denied the right to appear here in behalf of yourself. You cannot appear both by attorneys of record and in person. You have started your appearance in this case through attorneys of record. You have not conformed to law or the orders of the Court or of the Special Master in relation to the substitution of those attorneys. They will remain your attorneys of record until there is a legal substitution.

"MR. STRONG: I should like to have, Mr. Master, the record show that certain allegations were made—and made before this Master and this Court—that were heard by this Master, and which were made under oath and verified, and in which the record will show there was not one word of contradiction to those allegations. And those allegations went to the misconduct of counsel. And the record will show that the Court has completely ignored those allegations. The attorneys of record made not one word of record denying them and, therefore, that record stands and this Court has the responsibility that if and when something is made under verification and under oath, as an allegation, and not denied, it stands as the law that they are guilty of misconduct. The Court has seen fit to disregard that. The wisdom of the attorneys, of course, is far greater than mine as a layman. They saw fit to ignore it. For that reason I want this objection to show in the record, in behalf of myself as an individual, that it is not a good order, nor is it in conformance with any law; and the responsibility rests upon this Court to protect the individuals, and particularly the plaintiffs, when they are without counsel. If that is the ruling of the Master I shall retire from the room.

"SPECIAL MASTER DOERR: All statements made by Harry J. Strong in the course of this hearing, except the fact of his presence here, will be stricken from the record and will be given no effect.

"MR. STRONG: I shall ask that the decision be shown in the record, and I should like the record to show that I am personally now ordering a copy of the transcript. And I should like to further ask that if there is any off-of-the-record discussion that that not be taken in the presence of a reporter; but that it be properly handled by a recess and the reporter leave the room—not continue to make record off-of-the-record that does not show in the transcript.

"SPECIAL MASTER DOERR: What has just been added by Mr. Strong will likewise be ignored.

"MR. McMANUS: Mr. Special Master, may the record show that none of the attorneys of record have been paid their fees as required by your order of October 5, 1955?

"SPECIAL MASTER DOERR: The record will show your recitation of that statement.

"MR. WALKER: Mr. Special Master, I am wondering if it would serve any purpose to ask Mr. Strong, now that he is present, if he still refuses to testify.

"MR. McMANUS: Well, wait a minute. That's not the purpose of this hearing.

"MR. LARNED WATERMAN: Let the record show that this moment Mr. Strong departed from this hearing room.

"SPECIAL MASTER DOERR: The record will so show. Gentlemen, I believe we are now ready for argument on the motions to dismiss."

(Tr. 5-8, Master's Exhibit 4.)

Prior to dismissing the reporter, Mr. McManus mentioned that an involuntary bankruptcy petition had been filed against the First Iowa Hydro-Electric Cooperative during October in

the United States District Court for the Southern District of Iowa and that it was then pending. Mr. Waterman, counsel for one of defendants, suggested that the record ought to show that the bankruptcy petition was filed sometime after the defendants' motion to dismiss which had been filed on October 10, 1955. The following occurred:

"MR. WALKER: Well, I think we can stipulate that, can't we, Mr. McManus?

"MR. McMANUS: What is that, Mr. Walker?

"MR. WALKER: That the petition of bankruptcy was filed after the motion of dismissal was filed?

MR. McMANUS: That's correct.

"MR. WALKER: And you would agree and stipulate to that?

"MR. McMANUS: Yes, I agree to that. That's correct." (Tr. 11, Master's Exhibit 4.)

November 21, 1955

Filed Order on Motion to Dismiss, that deposition of Harry J. Strong will be resumed on December 6, 1955, at 11:00 o'clock a.m. at 725 Davenport Bank Building, Davenport, Iowa; that Harry J. Strong appear at said time for taking of deposition; in the event that Harry J. Strong shall not comply, then Div. I and Div. III, Para. 1 of Motion to Dismiss will be granted against Harry J. Strong and First Iowa Hydro Electric Cooperative and an order of dismissal supplementary to this order will be made; Div. II and Div. III, para. 2 of Motions to Dismiss of Defendants are denied without prejudice to the renewal thereof at any time, Edward A. Doerr, Special Master. (Copies mailed to all plaintiffs, their attorneys of record and to attorneys of record for defendants.) (R. 108)

November 28, 1955

Filed Notice of Appeal by F. A. E. Gillmor, Harry J. Strong and P. H. Naber, Individual Plaintiffs. (Said notice is set out below:)

NOTICE OF APPEAL

Notice is hereby given that F. A. E. Gillmor, Harry J. Strong and P. H. Naber, individual plaintiffs, hereby appeal to the United States Circuit Court of Appeals for the Eighth Circuit from the Order of Edward A. Doerr, Special Master, entered in this action on the 28th day of October, 1955.

Copy of said Order dated October 28, 1955 is attached hereto and made a part hereof.

Dated this 26th day of November, 1955.

F. A. E. GILLMOR,
Individual Plaintiff.
HARRY J. STRONG,
Individual Plaintiff.
P. H. NABER,
Individual Plaintiff.

(There is attached a copy of the Order signed by Edward A. Doerr, Special Master, and filed on October 28, 1955.) (R. 103)

November 29, 1955

Filed order that taking of deposition of Harry J. Strong be resumed on December 20, 1955, at 11:00 o'clock a.m. instead of December 6, 1955, all other provisions of order of November 21, 1955, to remain the same, Edward A. Doerr, Special Master. (Copies mailed to all plaintiffs, their attorneys of record and to attorneys or record for defendants.) (Said order is set out below:)

Plaintiffs by their attorneys of record have orally applied for a delay in the taking of the deposition of plaintiff Harry J. Strong which was to have been resumed on December 6th, 1955, under my order of November 21st, 1955. The application has been informally discussed by me with attorneys for certain of the defendants. None of the defendants have agreed to a delay and this order is made over the informal protests of some of them and will be considered to be ex parte as to all of them. Since my order of November 21st, 1955, a trial date in the week of December 12th, 1955, has been set on the petition in bankruptcy filed against First Iowa Hydro Electric Cooperative.

The result of the trial may be of importance in this case. Under the recited circumstances, I conclude that plaintiffs' application should be granted.

It is ordered that the taking of the deposition of plaintiff Harry J. Strong shall be resumed on December 20th, 1955, at 11:00 a.m. instead of December 6th, 1955, and that (except for the change in date) all of the provisions of my order of November 21st, 1955, with relation to the taking of such deposition shall remain in full force and effect.

This order will be served by the Clerk by mail, in the case of defendants by serving their attorneys of record, and in the case of plaintiffs by serving their attorneys of record and plaintiffs themselves.

December 19, 1955.

(Abstract of proceedings before Special Master on defendants' motion to determine law points.) On December 19, 1955, there came on before the Special Master, pursuant to order and notice, the motion of defendant Iowa-Illinois Gas and Electric Company to determine points of law raised in its answer. Plaintiffs were represented by Allan R. Shepherd, an attorney of record. The following proceedings occurred:

On December 19, 1955, there came on before the Special Master, pursuant to order and notice, the motion of defendant Iowa-Illinois Gas and Electric Company to determine points of law raised in its answer. Plaintiffs were represented by Allan R. Shepherd, an attorney of record. The following proceedings occurred:

> "MR. ALLAN R. SHEPHERD: May it be understood that my appearance in behalf of plaintiffs is subject to the objections which have been several times raised in the past by Mr. McManus as to the powers and jurisdiction of the Master, in the light of our previous objections to his appointment as violating the plaintiffs' rights to trial to a jury, as guaranteed them in a suit like this where a jury has been heretofore demanded, and in violation of the rights guaranteed them in the way of due process of law by the Fifth Amendment—that is, the rights guaranteed by the Seventh and Fifth Amendments to the Constitution

of the United States—along the same lines as previously? I believe Mr. McManus has been in the habit of making those objections at each of the meetings, has he not?

MR. DOERR: That's right. The objections are overruled. Your participation in the hearing will be without prejudice to the objections, or waiver of them."

(Tr. 3-4, Master's Exhibit 5.)

December 20, 1955

(Abstract of proceedings before Special Master. Allan R. Shepherd, one of the attorneys of record for plaintiffs, was present, as well as counsel for each of the defendants. Harry J. Strong and F. A. E. Gillmor were also present, together with observers Glenn Elston, of Rock Island, and a Mr. Benson. (Tr, 1960-1963) The following proceedings were had:)

"THE MASTER: Gentlemen, this hearing is scheduled for the resumption of discovery deposition proceedings. I believe we would better start off as usual by a recitation of appearances. We will start with you, Mr. Shepherd. If you care to make a record in that connection, do so.

MR. SHEPHERD: First, in conformity with Mr. McManus' established practice, I want to object to the power and jurisdiction of the Special Master on the ground that the order entered by Judge Riley on or about September 21, 1955, appointing this Master was void in contravention of the rights of the plaintiffs and their attorneys of record to a trial by jury where demanded and to due process of law under the 7th and 5th Amendments to the Constitution of the United States.

THE MASTER: The objection is overruled. Your partticipation in these proceedings will be understood to be without waiver of the objection."

Appearances for plaintiffs and defendants were noted and thereupon the following proceedings occurred:

"THE MASTER: Mr. Strong, will you take the stand then?

"MR. STRONG: Mr. Master Doerr, I wish to make a statement before this hearing and for the record.

"I was called and appeared on October 10th to continue giving testimony in this deposition and declined to testify under my constitutional right of having counsel with me in whom I have faith and trust.

"The Court has been on notice since September 2nd that we discharged the attorneys of record, namely: France, France & Nady and J. R. McManus and Allan R. Shepherd.

"The Court knows we filed under oath allegations of misconduct; answer was made by these attorneys, not under oath. A hearing was held and these attorneys had their opportunity to deny the charges, but not one word appears in the transcript of denial; therefore our charges stand as proved.

"Without one single word of denial of this misconduct, you, Mr. Master, found there is no misconduct. That matter has been appealed to the 8th Circuit Court of Appeals. I say now, it is up to the Appeals Court to dispose of that matter before it can go any further.

"Later in this very room and before you, Mr. Master, while you were presiding and in session, you brought up the question of my being cited for contempt of Court—the attorneys for the defense objected to my being cited—yet, and I am sure it is discharged attorneys, an attorney this court will not let us discharge, suggested to you, Mr. Master, that I should be cited quote, 'that may bring this boy to his senses' end quote. That is not in my best interest.

"Other of our discharged attorneys were present, heard this and did not say one word; thereby their silence was not defending my best interest. Their silence was complete acquiescence to what Mr. McManus said—that I should be cited for contempt of Court.

"Does anyone believe I should be compelled to give testimony in this Court without attorneys in whom I have trust and faith?

"As to the $2500 that the Court has ordered us to pay—to carry the costs of taking this deposition, I want it known that I purchased a bank check for the $2500 on

September 28, 1955, then I called my associate plaintiffs to advise them. They insisted that I get legal advice as to the propriety of paying in this money.

"It was our understanding the Court ordered the Union Electric Company to pay all the costs. Without our knowledge the attorneys we had went before the Court asking that this Utility pay them a fee while this deposition was being heard. I understand the Court denied same.

"In this very room Mr. Bergstrom, the expert in anti-trust law, said he was the one who got the words 'office rental' into the order, and therein lays the grounds for the Court to come at us to put up the $2,500. This, too, ha been appealed and should be disposed of before this Court can or should go any further with this particular matter.

"I say to you, we do not want this case dismissed because of our failure to pay into the Court the $2500. We do not have the $2500. What money as would be available, and I say to you if we had our funds today, I would pay the $2500 into the Clerk of Court, but under protest.

"Our funds in the amount of $5,081.81 were improperly ordered turned over to a receiver in an involuntary bankruptcy case in this same Court (being Case No. 1-177) that money did not belong to the First Iowa Hydro Electric Cooperative. The Court knew this and ordered me to be put in jail—and I was put in jail until our attorney, in this case, turned the money over to the receiver.

"The Court was advised I turned this money over voluntarily to the attorney in that bankruptcy case, No. 1-177, on November 12, 1955, and I was put in jail on the 29th.

"Our attorney advised me that I could not go to jail, that if I was cited, all that it took to purge the contempt was to turn it over, that the Court would have to hold a hearing or show cause, before anyone could be jailed. I was in jail. They say it can't be done, but I was there. I ordered the attorney to turn over the money, three days before I was jailed. The attorney for the receiver was fully advised of all this.

"This same attorney told me Judge Riley could be held personally liable for putting me in jail and not giving me a hearing.

"We were declared not bankrupt by the jury after two days of trial.

"This tangent case of bankruptcy has become a part of our lawsuit as here being heard. Our money is tied up until it is returned, if the funds are returned we will pay the $2500 into the Court.

"I cannot see how this Court with one hand can take our funds away from us and with the other hand say, pay $2500 or the main lawsuit will be dismissed.

"Again I say to you, Mr. Master, this whole thing has been appealed, notice of such appeal was made on November 26th, the filing fee was paid, and the bond has been furnished.

"The matter is from the moment of that Notice of Appeal being read by the Clerk of Court out of the jurisdiction of this Court, and I cannot understand the persistence to ignore it and continue on as if it were not filed.

"Under the circumstances of the Court suppressing so much of the record that it is impossible for me to fully acquaint my attorney so he can come into this Court and properly protect my interests, and being without counsel of my own choice and in whom I have trust and faith, I believe I would be justified in refusing to testify.

"Therefore I stand upon my constitutional rights and ask that I be excused from testifying until I have counsel of my own choosing and in whom I have faith. I do not have faith in the attorneys here presuming to represent me.

"Your Honor, if you compel me to go on the witness stand, I am going on. I do not want to be in contempt of this Court, and I don't want to spend Christmas in jail. I ask that I be excused from testifying until I can get attorneys of my choice, and in whom I have faith while I am testifying on the witness stand.

"THE MASTER: You have not been threatened with contempt procedure so far as I am aware in connection with these discovery deposition proceedings. The alternative which has been put up to you is to suffer a dismissal of this case so far as you and the First Iowa Hydro Electric Cooperative are concerned, in case you refuse to testify.

"Your request to be excused from testifying is denied, and you are instructed now to submit yourself as a witness for discovery deposition proceedings.

Strong then asked the Master whether his refusal to testify would subject him to contempt proceedings or whether it "will be just dismissal of the case," saying that "you may proceed with the dismissal as your judgment or your decision. I will chance the dismissal." (Tr. 1970) The Master told Strong that prosecution of contempt procedure was not within his control and that any application for contempt would be made to the court and not to the master. After discussion between Strong and the Master, Strong requested a few minutes with which to consult with Mr. Shepherd, one of counsel of record for the plaintiffs. In response to this request, the Master granted a recess. After the recess Strong again stated that he would refuse to testify and the following occurred:

"THE MASTER: You understand the consequence of your refusal to testify will be the entry of an order of dismissal by me of this action insofar as it is brought by Harry J. Strong and First Iowa Hydro Electric Cooperative, do you?

"MR. STRONG: I understand that, Your Honor.

"THE MASTER: Very well. That concludes our hearing, unless anyone else has anything for the record. Now is the time to offer it. (Tr. 1975)

It was thereupon moved on behalf of the defendants that in view of the termination of the deposition by the witness Strong the Special Commissioner be directed to submit the portion of the deposition to date to Mr. Strong for signature, and in the event of his signature or failure to sign within twenty (20) days that the Special Commissioner be directed to file that

deposition with the Clerk of the District Court without prejudice to any rights that the defendants may have to further interrogate Mr. Strong at some future time.

"THE MASTER: The motion will be granted.

"MR. SHUTTLEWORTH: Mr. Special Master, it seems to me in view of the references that have been made just as statements and also some of the paper work of the bankruptcy proceedings, I believe the record should show at this time, and if Mr. Shepherd will concur in a stipulation, so that whatever it is worth, this record will definitely show that the proceedings in the matter of the First Hydro Electric Cooperative Association, involuntary petition in bankruptcy, McDougal & Condon, Inc., Lloyd Drexler and Seth Gooder, petitioners, in the United States District Court for the Southern District of Iowa, Davenport Division, as being an involuntary petition in bankruptcy and carrying the title Bankruptcy Number 1-177, which was tried and concluded last week, in connection with the trial of which the First Hydro was represented by two firms of attorneys—a Mr. MacLaughlin, Francis J. MacLaughlin of Davenport, Iowa, and another firm, Bell, Farrar & Scott of Rock Island, both of whom appeared and represented First Hydro Electric Cooperative Association; and that in connection with that trial, the jury returned a verdict in favor of the First Hydro Electric Cooperative Association, and it was not adjudged a bankrupt.

"Will you stipulate to that fact, Mr. Shepherd?

"MR. SHEPHERD: I understand that that is true. I have never seen those proceedings, and I wasn't present, but I have no question that that is the fact. I wasn't present, and I can't tell you that I saw it. I was in Des Moines.

"But my information is that you are absolutely correct.

"MR. SHUTTLEWORTH: Unless you can stipulate to it—

"MR. SHEPHERD: I know nothing but hearsay. I have never seen the record. I wasn't there, Mr. Shuttleworth. I understand that what you are saying is true, but I can't tell you of my own knowledge.

"I have no question that it is true, but I don't know it myself.

"MR. SHUTTLEWORTH: Do you have any objection to that?

"MR. SHEPHERD: No, but I can't say—

"MR. MILLER: Do you have any objection to it being made part of the record here?

"MR. SHEPHERD: No, I don't object.

December 22, 1955

Filed Order that Special Commissioner Michael T. Organ shall communicate with Harry J. Strong within 7 days from the date hereof re submission to him of transcript of depositions; for entering changes and for signing of said depositions; if deposition is signed within 20 days, or if not signed within such period, Special Commissioner shall sign same, giving reasons for not signing, if any, and shall file deposition with the Clerk of this Court; depositions so filed may be used by defendants as provided by the Federal Rules of Civil Procedure, but said filing is without prejudice to all rights of defendant to further interrogate said witness, Edward A. Doerr, Special Master. (Copies mailed to all plaintiffs, their attorneys of record, attorneys of record for defendants and to Michael T. Organ, Commissioner.)

December 22, 1955

Filed Order dismissing action as to plaintiffs Harry J. Strong, and First Iowa Hydro Electric Cooperative, such dismissal to operate as an adjudication upon the merits, Edward A. Doerr, Special Master. (Copies mailed to all plaintiffs, their attorneys of record, attorneys of record for defendants and Michael T. Organ, Commissioner.) (R. 115)

December 22, 1955

Filed Order that deposition of plaintiff F. A. E. Gillmor shall be taken at 11:00 o'clock a.m. on January 10, 1956, at 725 Davenport Bank Building, Davenport, Iowa, and F. A. E. Gill-

mor is ordered to attend and submit to taking of his deposition, Edward A. Doerr, Special Master. (Copies mailed to all plaintiffs, their attorneys of record, attorneys of record for defendants and Michael T. Organ, Commissioner.) (Said order is set out below:)

Pursuant to notice heretofore given and in conformity with prior orders of the court, it is ordered that the deposition of plaintiff F. A. E. Gillmor shall be taken commencing at 11:00 o'clock a.m. on January 10, 1956, at room 725 Davenport Bank Building, Davenport, Iowa, and continuing thereafter in the regular course of procedure. The plaintiff F. A. E. Gillmor is ordered to attend and submit to the taking of his deposition accordingly.

This order will be served by the Clerk by mail, in the case of defendants by serving their attorneys of record and in the case of plaintiffs by serving their attorneys of record and plaintiffs themselves.

December 30, 1955

Filed order of Special Master Doerr re appointment of Special Commissioners. (Said order is set out below:)

On March 10, 1954, defendant Union Electric Power Company noticed the depositions of the individual plaintiffs and others. On May 16, 1955, the court entered an order relating to deposition procedures and appointing Michael T. Organ, or in his absence Earl W. Radford, both of Chicago, Illinois, as Commissioner to take the deposition of Harry J. Strong. On September 21, 1955, the court entered an order appointing Edward A. Doerr as Special Master with all powers authorized by Rule 53. On December 22, 1955, the Special Master entered an order requiring plaintiff F. A. E. Gillmor to appear for his deposition commencing at 11:00 A.M. on January 10, 1956, at room 725, Davenport Bank Building, Davenport, Iowa. It is contemplated that the deposition of F. A. E. Gillmor will be followed by the depositions, to be later scheduled, of the other individual plaintiffs, Carl J. Mitzner, Harry Imel and P. H. Naber, and of witnesses Ray Norris and J. M. Roth.

Accordingly, it is ordered that Michael T. Organ, or in his absence Earl W. Radford, both of Chicago, Illinois, be ap-

pointed as Special Commissioner, in accordance with Rules 28 and 30, for the taking of the depositions of F. A. E. Gillmor, Carl J. Mitzner, Harry Imel, P. H. Naber, Ray Norris and J. M. Roth, and the Special Commissioner is for that purpose commissioned to swear the witnesses, to proceed with the taking of the depositions when and as scheduled, and to sign the respective certificates upon the completion of the taking of each deposition.

This order will be served by the Clerk by mail, in the case of defendants by serving their attorneys of record and in the case of plaintiffs by serving their attorneys of record and plaintiffs themselves.

Dated December 30, 1955.

EDWARD A. DOERR,
Special Master.

January 3, 1956

Filed plaintiffs' petition for review and proof of service. (R. 116)

January 4, 1956

Filed report of Special Master Doerr. (R. 120)

January 4, 1956

Filed Exhibits 1, 2, 3, 4 and 5 to Report of Special Master Doerr. (These exhibits constitute the transcript of the hearings and proceedings referred to in the Master's report, Exhibit 1 being the hearing on October 3, 1955; Exhibits 2 and 3—October 10, 1955; Exhibit 4—November 18, 1955, and Exhibit 5—December 20, 1955.)

January 9, 1956

Mailed notice with copy of report of Special Master Doerr attached to all plaintiffs, their attorneys of record and attorneys of record for defendants.

January 9, 1956

Filed order for hearing on report of Special Master Doerr and petition for review and prior order to be heard at Des Moines, Iowa, at 9:30 a.m., Janury 20, 1956, Riley, J. (Copies mailed to all plaintiffs, their attorneys of record and attorneys of record for all defendants, and to Special Master.) (Said order is set out below:)

It appearing to the court that the Special Master has filed and has given notice of his report of certain proceedings culminating in his order of December 22, 1955, dismissing as to certain named plaintiffs and asking this court's approval and confirmation thereof; and it appearing, too, that all plaintiffs by their counsel of record have filed a Petition for Review of such order, asking that it be vacated; and it further appearing that all defendants joined in a Motion to Dismiss filed herein on October 11, 1955, by defendant Union Electric Power Co., which, among other reasons, asked for dismissal because of refusal of plaintiff Harry J. Strong to testify in discovery depositions and of all plaintiffs to make deposit of the amount required by a prior order of this court;

IT IS NOW ORDERED that the report of the Special Master of December 22, 1955, relating to the dismissal of this cause as to plaintiffs First Iowa Hydro Electric Cooperative and Harry J. Strong, and the Petition for Review filed by counsel of record for plaintiffs, and the disobedience of all plaintiffs herein to the order of this court of September 21, 1955, requiring the deposit of certain funds into the registry of this court, shall come on to be heard at Des Moines, Iowa, before this court at 9:30 o'clock a.m., on Friday, January 20, 1956, and that notice of said hearing shall be given by mailing to all counsel of record and to the individual plaintiffs a copy of this order.

IT IS FURTHER ORDERED, to permit all interested parties to be advised, that the order of September 21, 1955, appointing the Special Master does not and cannot deprive plaintiffs of their right of trial by jury if their request therefor has been seasonably made, nor does it empower the Special Master ultimately to hear and determine the issues between the parties upon the trial of this cause, but does empower the Special Master to proceed in respect of legal questions to be ruled

upon, subject to the court's approval, and to have such other powers; not including trial of the issues, as are described in Rule 53(c) of the Federal Rules of Civil Procedure, or otherwise stated in the order of appointment of September 21, 1955, and not inconsistent with this order.

January 10, 1956

Filed box containing deposition of Harry J. Strong taken at Davenport, Iowa, on June 6, 7, 8, 9, 10, 13, 14, 15, 16, 17, 20, 21, 22, 23, 24, July 11, 12, October 10 and December 20, 1955, on behalf of defendant Union Electric Power Co.

January 10, 1956

(Abstract of deposition of F. A. E. Gillmor before Special Master, held January 10, 1956.)

The appearances of the attorneys of plaintiff were noted and stated as follows:

"APPEARANCES:

MR. JAMES D. FRANCE,
XAVIER C. NADY,
FRANCE, FRANCE & NADY,
First National Bank Building,
Tipton, Iowa.

MR. JAMES R. McMANUS,
MR. ALLAN R. SHEPHERD,
417 Fleming Building,
Des Moines, Iowa.

HALEY, DOTY & WOLLENBERG,
1735 DeSales Street,
Washington, D. C.
(Of Counsel)
Attorneys for plaintiffs;
By: MR. JAMES R. McMANUS."

(Tr. 2, F. A. E. Gillmor Deposition)

One or more of the attorneys of record for each of the defendants announced appearance, and in addition to the Special

Master there were present Mr. F. A. E. Gillmor, Mr. Harry J. Strong, and Mr. Richard Honts. (Tr. 5, Gillmor Deposition.)

The following proceedings were had:

"MR. McMANUS: Mr. Special Master, I would like to request counsel for the defendants to agree that in order to avoid encumbering the record, I may be given the benefit and advantage of the objections that I have heretofore urged in proceedings before the Special Master with respect to the right of jury trial guaranteed by the Seventh Amendment to the Constitution of the United States, in order to avoid repeating them. I am wondering if you will all signify your willingness that I may be given the benefit of these objections, the same as before, without repeating them.

"THE MASTER: If I hear no objection, I will assume that it is agreeable to everyone here. We will start out as usual by reciting the appearances.

"MR. McMANUS: James R. McManus, appearing for the plaintiffs in this case, and also appearing as counsel for the attorneys of record for plaintiffs."

Appearances defendants were noted, and thereupon the following proceedings occurred:

"THE MASTER: Mr. Gillmor, this meeting is called for the purpose of taking your deposition.

"I will ask you to come forward for that purpose, and I will ask Mr. Organ to administer the oath to you. Mr. Organ is the Commissioner.

"THE COMMISSIONER: You are a little hard of hearing?

"MR. GILLMOR: (No response.)

"THE MASTER: You are hard of hearing?

"MR. GILLMOR: Yes.

"THE COMMISSIONER: Will you raise your right hand?

(Witness raised right hand.)

"THE COMMISSIONER: What is your name, please?

"Will you please keep your hand raised?

(Witness lowered hand.)

(Mr. Gillmor then read from a prepared paper as follows:)

"MR. GILLMOR: Gentlemen, I have been called to testify, and, Mr. Doerr, I am F. A. E. Gillmor, President of First Iowa Hydro Electric Cooperative. I wish to make a statement before this hearing and for the record.

"I am called here to give testimony when the case of the First Iowa Hydro Electric Cooperative stands dismissed by Master Doerr as per his order of December 22, 1955. The matter is now before Judge William F. Riley for his ruling on such dismissal and should be disposed of before any further proceeding, as is here and now contemplated.

"I and the other plaintiffs, discharged the attorneys of record for misconduct and the Court has been on notice of such action since September 2, 1955.

"The Court prefers to change our motion to remove the attorneys to one of substitution and improperly ruled accordingly.

"That matter is before the Circuit Court of Appeals and we feel confident it will be reversed. Also, the qualifications of this Master and his appointment will be before the Court of Appeals; that, too, I feel will be undone.

"The appointment of the previous Master, Wayne Cook, will be before the Appeals Court; our showing of him, as in our opinion, being a chief counsel of the defendants deserves to be corrected.

"I, being without counsel of my own choosing, with this Court's action making it impossible for me to get counsel in whom I have trust and faith—with this Court trying to compel me to give testimony with counsel in whom I have lost confidence, faith and trust, and knowing we have discharged those who presume to represent me,

I will stand on my Constitutional rights and ask that I be excused from testifying.

"THE MASTER: Mr. Gillmor, I cannot excuse you from testifying. I must require you to testify. You will either have to submit to the taking of your deposition or refuse.

"A request that you be excused is denied.

"MR. GILLMOR: I want it to be known by all, I do not fear any questions that may be asked—we have nothing to hide or evade.

"My position is, this Court has shown itself so completely prejudiced and unfriendly that together with attorneys supposedly to represent us who can be influenced by the Court and willing to sell us out and not work in our best interest, there is nothing I can do but refuse to testify and await the results of a higher Court to set things right.

"MR. McMANUS: May I say something?

"MR. GILLMOR: You are not my attorney.

"MR. McMANUS: You just said that your attorneys are trying to sell you out. Do you have any evidence to substantiate or back up the statement that you made; because you are going to be given an opportunity to tell it to the Polk County Grand Jury very soon. So you had better be getting ready. If you have anything to say, I invite you to tell these gentlemen what you know to back up the statement you just made.

"MR. GILLMOR: You have it in the record.

"MR. McMANUS: Will you tell us what it is?

"MR. GILLMOR: It is in the record. You ought to know.

"MR. McMANUS: You don't know, and there isn't any such thing.

"MR. GILLMOR: I don't mean to be ungentlemanly or defiant, but I want a fair deal.

"THE MASTER: Mr. Gillmor, I understand that you do refuse to testify, is that correct?

"MR. GILLMOR: Yes, that is correct, according to my Constitutional rights.

"Put that in the record.

"MR. WALKER: (Addressing Mr. Gillmor.)

"Will you wait just a moment, Mr. Gillmor?

"I would like to renew the motion to dismiss that was made as to the First Iowa Hydro Electric Cooperative and Harry J. Strong in its entirety as to this plaintiff, F. A. E. Gillmor.

"I would also, having now incorporated that motion to dismiss as to Gillmor, ask the Special Master if he will now rule upon that motion to the extent of putting Mr. Gillmor on notice that he will be dismissed if he refuses to testify further.

"MR. LARNED WATERMAN: I would like the record to show that Iowa-Illinois Gas and Electric Company joins in and adopts the motion of Union Electric Power Company as to F. A. E. Gillmor, plaintiff.

"MR. McMANUS: Gentlemen, I would suggest that if you want to file a motion, it cannot be done in this informal way, and you will have to file a written motion and serve copies of it in accordance with the Rules.

"MR. SHUTTLEWORTH: If the Master please, I request that Mr. Gillmor be requested to stay in the room until we are through with this proceeding.

"THE MASTER: Let the record show that he has, of his own accord, left the hearing room.

"By 'he,' I refer to the plaintiff, F. A. E. Gillmor.

"MR. STEELE: Does the record show that Mr. Gillmor's statement was read from a prepared paper?

"THE MASTER: The record will show that the statement read by Mr. Gillmor was read from a paper in his possession." (Tr. 8-14, Gillmor Deposition)

Thereupon, following the departure of Mr. Gillmor, a discussion was had as to the time of taking the depositions of the three remaining plaintiffs, during the course of which the following colloquy occurred.

"THE MASTER: I would be disposed to make it one week from today. There are three remaining plaintiffs, and to cite them successively, for 11:00 a.m., 1:00 p.m. and 2:00 p.m., one week from today.

"MR. STRONG: Mr. Doerr, isn't it true that this matter of dismissal on the case against the First Iowa Hydro Electric Cooperative and H. J. Strong is now before Judge Riley, and set for hearing in Des Moines on January 20th of this year?

"MR. SHUTTLEWORTH: Does the reporter have the name of the party who is making this speech?

"MR. STRONG: H. J. Strong, and a pretty good speech, too.

"THE MASTER: I can't listen to you, Mr. Strong.

"MR. STRONG: I am a plaintiff in this case.

"THE MASTER: I can listen to you only as you speak through your attorney of record, Mr. McManus.

"MR. STRONG: I have no attorney. I want the Court to be on notice that the Judge has set January 20th for a hearing in Des Moines on this matter of dismissal; and why this Court pursues and persistently pursues an arbitrary position of not wanting it disposed of by the Court, in which hands it is at this time, I cannot understand.

"THE MASTER: I don't want to quarrel with you. I must be consistent in the position that I have taken.

"MR. STRONG: I wanted to make our objections very, very clear: That we expect the Court to dispose of the matter that is before them before there is any further proceeding in the matter here. Building up a record for the defendants doesn't help any at all, nor it certainly isn't any help to the plaintiffs. I can't see that it will be of any help to the defendants.

"THE MASTER: Mr. Strong's remarks will be given no force or effect, and will not be considered a part of the record." (Tr. 19-20, Gillmor Deposition)

The proceedings were adjourned to reconvene at 2:00 p.m., the same day at the same place. The attorneys of record for plaintiffs and defendants were present as before, and also present were Mr. Strong and Mr. Honts, at which time the Master announced that since the morning session he had reached the conclusion that oral motion could not be considered and that it would have to be put in written form and notice given, referring to the motion to dismiss of the defendants by reason of the acts and conduct of the plaintiff Gillmor individually and as an officer and director of the corporate plaintiff. (Tr. 23-31, Gillmor Deposition.) The Master then announced that the written motion to dismiss of the defendants filed January 10, 1956, would come on for hearing at Room 725 Davenport Bank Building, Davenport, Iowa, on the 16th day of January, 1956, at 3:00 p.m., and that an order to that effect would be entered and that these proceedings would be adjourned until Monday, January 16, 1956, at 11:00 a.m., in the same place.

January 10, 1956

Filed motion of Union Electric Company to dismiss as to F. A. E. Gillmor, and joinder by other defendants. (R. 123)

January 11, 1956

Filed order of Special Master Doerr that motions to dismiss will be heard on January 16, 1956. (Said order is set out below.)

It is ordered that the motions to dismiss filed on January 10th, 1956, made by defendant Union Electric Power Company and joined in by all of the other defendants, shall be heard at room 725 Davenport Bank Building, Davenport, Iowa, on the 16th day of January, 1956, at 2:00 o'clock p.m.

This order will be served by the Clerk by mail, in the case of defendants by serving their attorneys of record and in the case of plaintiffs by serving their attorneys of record and plaintiffs themselves.

January 11, 1956

Filed order of Special Master Doerr re depositions of Carl J. Mitzner, Harry Imel and P. H. Naber to be taken on January 16, 1956. (Said order is set out below.)

Pursuant to notice heretofore given and in conformity with my prior orders and orders of the Court, it is ordered:

1. The deposition of Carl J. Mitzner shall be taken commencing at 11:00 o'clock a.m. on January 16, 1956.

2. The deposition of plaintiff Harry Imel shall be taken commencing at 1:00 o'clock p.m. on the same date.

3. The deposition of plaintiff P. H. Naber shall be taken commencing at 2:00 o'clock p.m. on the same date.

All of such depositions shall be taken at Room 725, Davenport Bank Building, Davenport, Iowa.

This order will be served by the Clerk by mail, in the case of defendants by serving their attorneys of record and in the case of plaintiffs by serving their attorneys of record and plaintiffs themselves.

January 16, 1956

(Abstract of deposition of Carl J. Mitzner and Harry Imel held January 16, 1956.) Pursuant to the order of the Master, Carl J. Mitzner appeared before Michael T. Organ, Special Commissioner to take depositions, at 11:00 a.m., in Room 725, Davenport Bank Building, Davenport, Iowa. The plaintiffs appeared by their attorneys of record and all of the defendants appeared by one or more of their attorneys of record. There were also present as observers A. L. Elston and Glenn Elston. The Master called the meeting to order for recital of appearances. James R. McManus and X. C. Nady appeared for plaintiffs. The following proceedings occurred:

"MR. McMANUS: I appear on behalf of the plaintiffs, and I want to reurge the objection to the proceeding and to the validity of the Order made appointing the Special Master on the grounds heretofore urged with

respect to the violation of the Fifth Amendment and the Seventh Amendment to the Constitution of the United States, and the plaintiffs and counsel of record contend this is not a case for the appointment of a Special Master under the rules. There are no complicated issues within the meaning and intent of the Rules of Civil Procedure, no special circumstances, and the Order appointing the Special Master constituted an abusive (sic) discretion upon the part of Judge William F. Riley, the judge who made the appointment of the Special Master in this case, and we repeat and reurge those objections which we have heretofore made to appearing and proceeding before the Special Master for those reasons.

THE MASTER: The objection will be overruled. Your participation in the subsequent proceedings here will be without prejudice to that objection."

Carl J. Mitzner, after having been first duly sworn by the Commissioner, testified: I reside at Tipton, Iowa; my only business is farming and participating in Boy Scout activities and "things of that kind"; other than time spent in service, I have farmed all my life; my farming operations are in Cedar County, Iowa; I look after another farm or two and am interested in one farm in Delaware County, Iowa; I am a member and am on the Board of Directors, and an officer of the First Iowa Hydro Electric Cooperative now and since it was incorporated in 1938; I am currently vice-president of that Cooperative; I also am a member of the Cedar County Cooperative Oil Company of Tipton, Iowa, the Maquoketa Valley R.E.A. Cooperative, and a small dairy cooperative in Delaware County; I am also a member of the Eastern Iowa Light and Power Cooperative and served as a director thereof from 1936 to 1938 and 1944 to 1945 (18 months); I have read the complaint but hesitate to say that I understand it. (Tr. 9-13, 152, Mitzner deposition) Mr. Strong has the records. Repeatedly we have delegated him as our manager and representative in these things. So much of the time I was not present at even a few of these hearings. When I made those trips and participated it always meant I would have to leave a farm or maybe two farms in charge of someone else to do that.

Mr. Mitzner further testified that he was one of the individual plaintiffs; that he assumed, as a member of the Cooperative and one of its directors, he would have to stand behind everything that was furnished as evidence by Mr. Strong through his deposition. (Tr. 24, Mitzner Deposition)

Mr. Mitzner further testified that he made some contributions in money and time to the Cooperative; that he gave the money to Mr. Strong; that Mr. Strong at all times took care of the money affairs of the Cooperative, (Tr. 42, Mitzner Deposition) and that Jake More had been retained in an advisory capacity, but as he recalled it he had been notified that the Cooperative no longer was retaining his services. (Tr. 43-44, Mitzner Deposition)

Following the noon recess the hearings were again resumed at one o'clock p.m., with the same attorneys of record as at the morning session, and with the same observers. The deposition of the plaintiff Harry Imel, by agreement and order of the Master, was recessed until 10:00 a.m., January 17, 1956, at the same place.

Carl J. Mitzner resumed the stand and he further testified that Mr. Harry Strong, Harry Imel, Pete Naber, Frank Gillmor and himself constituted the directors of the Cooperative; (Tr. 62, Mitzner Deposition.) and that since the organization of the Cooperative, Strong had acted as General Manager and Gilmore, except for a short period, had acted as President. (Tr. 63-64, Mitzner Deposition)

The witness said that he had attended one or two of the hearings before the Federal Power Commission, that he had not accompanied other members of the Cooperative or its attorney on trips to New York or Chicago in connection with financing, but he did not believe he contributed to the answer to the interrogatories filed by defendants, and that he was not familiar with the interrogatories or the answers that were made thereto. (Tr. 101 through 104, Mitzner Deposition)

The witness further testified that there were no regular financial statements of the First Iowa Hydro [illegible] (Tr. 118, Mitzner Deposition). He also stated that he had not talked to any bonding house or a representative of a bonding house about the financing of the project (Tr. 129, Mitzner Deposition), and that Mr. Harry Strong had control of the

spending for the First Iowa Hydro Electric Cooperative (Tr. 130, Mitzner Deposition), and that he had no idea as to the amount of money that had been raised by the Cooperative and that no audit was ever made of Mr. Strong's records, to his knowledge. (Tr. 131, Mitzner Deposition)

He said that Mr. Harry Strong had the original conception of the idea of the formation of the First Iowa Hydro Electric Cooperative, and that he has been the moving force in the Cooperative. Strong was the one who negotiated and took care of the business affairs, and that much of the information he had in connection with the law suit came from Harry Strong or others. (Tr. 145-146, Mitzner Deposition)

With reference to his testimony in this proceeding the following questions were asked and answered, to-wit:

"Q. During the course of your meetings, your Board meetings, have you discussed between yourselves the question of your testimony here at the depositions?

"A. Not specifically, I would say. I would say we did yesterday, yes; otherwise not.

"Q. Have you discussed in that connection the matter of whether or not you would testify?

"A. Yes.

"Q. And what have you been advised in that connection?

"A. By Mr. Strong, yes.

"Q. Have you been advised by anyone else?

"A. Yes. I would say advised, or at least have had suggestions offered, yes.

"Q. From whom did these suggestions come?

"A. Well, I could say Mr. Elston, for instance. We have talked it over, at least. Mr. Hakes, I guess. I have talked it over with him; and of course, as I said, the five of us directors met and we talked it over. And as I have disclosed to you, I have not followed exactly the line that Mr. Strong suggested, but nearly so.

"Q. And at that time did you discuss between yourselves the advisability of your testifying or refusing to testify?

"A. Yes.

"Q. And you were advised in that connection by Mr. Strong?

"A. Yes.

"Q. What was that advice?

"A. Well, he suggested that I probably stand on my Constitutional rights to refuse, because I did not have counsel."

(Tr. 159-160, Mitzner Deposition)

The witness further testified that the records of the First Iowa Hydro Electric Cooperative have always been kept and maintained by Mr. Strong and he assumed that these records were in the home of Mr. Strong; and that by and large Mr. Strong was the man running the show and he made his reports about his activities. (Tr. 167, Mitzner Deposition)

By agreement Mr. Mitzner's deposition was recessed to the resumed at a date later to be ordered or agreed upon. (Tr. 170-171, Mitzner Deposition)

Whereupon the proceedings were recessed until 9:00 a.m., January 17, 1956, for the deposition of Mr. Harry Imel. (Tr. 172, Mitzner Deposition)

On January 16, 1955, pursuant to the former notices and orders, Mr. Harry Imel and Mr. P. H. Naber appeared for the taking of their depositions at Room 725 Davenport Bank Building, Davenport, Iowa. The same appearances were noted as in the case of the Carl J. Mitzner deposition earlier that same day. Mr. McManus urged the same objections, without repeating them, as he urged with respect to the taking of the Mitzner deposition, which objections were then overruled by the Master. Thereupon both Mr. Imel and Mr. Naber were sworn and indi-

cated their willingness to give testimony, and Mr. Imel's deposition was recessed until 9:00 a.m., January 17, 1955, and Mr. Naber's deposition was recessed subject to call. On January 17, 1955, Mr. Imel appeared and testified as follows:

My name is Harry Imel, I-m-e-l. I reside at Muscatine, Iowa. and have been engaged in the grain and feed business as a Broker since 1927, and currently am on the road most of the time. I lived in Indiana until 1941, when I moved to Muscatine, and I still have farming interests in Indiana. Since moving to Muscatine I have had minor farming interests in, connection with Mr. C. C. Hakes and Mr. Naber. I am a director of the First Iowa Hydra Electric Cooperative and a plaintiff in this litigation. I have no familiarity with the engineering aspects of the cooperative's project and my familiarity with the financial arrangements are in a "broad sense"—"Well, I know the line of business that a person would have to go through; that is, down the line, to finally be at the point of constructing this project." (Tr. 7-11, 70-72, 80-85, 88-89, 148-152, 189, Deposition of Harry Imel) Mr. P. H. Naber, with whom I share farming interests, also shares farming interests with Mr. C. C. Hakes. (Tr. 82, Deposition of Harry Imel) I knew nothing of Harry Strong's educational background, banking or accounting experience, or his political, professional, or philosophical activities, and my only knowledge of Strong's business experience in financing cooperatives and hydro electric projects has been acquired in connection with the First Iowa project. (Tr. 127-131, Deposition of Harry Imel)

Mr. Harry Strong organized the First Iowa Hydro Cooperative. During the period that I have been on the board of directors Mr. Harry Strong was the actual moving force of the project. I think the board of directors kind of believed in him. We knew what he had been doing and left it up to him. He is the only one who has devoted his full time to the First Iowa Hydro Electric Cooperative. He would make reports to the board and we would accept those reports. He managed everyth... (Tr. 19, Deposition of Harry Imel.) I have made periodic contributions since I became a member, about 1946 or '47, I would guess somewhere between Three and Ten Thousand Dollars. During this period we have had periodic financial reports from Mr. Strong as to the finances of First Hydro. These were on legal papers setting out all the prior donations. As to

expenses, he gives us a report after a fashion. We have never asked him to set up a form. I have never seen his reports as to expenses. He simply recites or reads them to us. (Tr. 40-41, deposition of Harry Imel)

I didn't personally contact any of the banking houses that turned down our financing, and the reason I didn't was because that was Mr. Strong's job and like I say, we put our confidence and our trust in him. (Tr. 52-53, Deposition of Harry Imel.) The expenditures were reported after it had been spent and I never heard the board reprimand Mr. Strong for the way he conducted it and the handling of the affairs from the financial standpoint. We never had an audit we didn't think it was necessary. We had no set dates for reports. I don't think the First Iowa Hydro Electric Cooperative had a bank account. I couldn't say exactly how much Strong kept the funds. I wouldn't say that he deposited all the funds. The board knew pretty well what Mr. Strong was doing. (Tr. 90-93, Deposition of Harry Imel)

With further reference to the matter, the witness testified as follows:

"Q. Are you speaking about expenses of the Cooperative, or expenses of Harry Strong, personally?

"A. Harry Strong was the general manager of First Iowa, and he spent 100 percent of his time working at the business, and naturally he had to live, and our contributions went for the promotion of First Iowa.

"Q. Do you mean then that the money paid to the First Iowa was used by Harry Strong personally?

"A. Was he privileged to live out of it, pay the expenses, is that what you mean?

"Q. Yes.

"A. Yes:

"Q. Did he do so?

"A. I think he did."

(Tr. 94-95, Deposition of Harry Imel.)

I would have to check the records before I could answer about any arrangements made by the board for the payment of Harry Strong's personel expenses. I wouldn't say if there were no minutes in the records that there was no agreement. I would say—like I told a while ago—we fellows on the board had confidence in Harry Strong, and he has reported to us as to expenditures, and all. (Tr. 97, Deposition of Harry Imel)

(The deposition of Harry Imel was resumed at 1:30 p.m., on January 17, 1956, with attorneys of record appearing as noted at the morning session, and additionally a Mr. A. L. Elston was present as an observer.)

Mr. Strong was and is the guiding force of the First Iowa Hydro Electric Cooperative, and he is the General Manager, Secretary and Treasurer. I have known Mr. Strong since 1947, and during all that time he has lived at 1011 East High Street, Davenport, Iowa. (Tr. 124-126, Imel Deposition.) Mr. Frank Gillmor is President of the Cooperative. I think before him there was a man by the name of Ray Norris who was President. (Tr. 141, Deposition of Harry Imel.) I am not familiar with the present indebtedness of the Cooperative and wouldn't know the amount of its indebtedness. (Tr. 143, Deposition of Harry Imel.) I have no independent knowledge, outside of the record, of anything filed or produced in this case. (Tr. 145, Deposition of Harry Imel.) It has always been my understanding that our plan and proposal for the financing and construction of the First Iowa Hydro Electric Cooperative depended exclusively on obtaining 100% financing from other sources and by way of the sale of bonds. (Tr. 150, Deposition of Harry Imel)

At this proceedings the Special Master entered the hearing room and reported that he had prepared a supplemental report as Special Master that was ready for filing, and arrangements were made to have it filed with the Clerk and the copies received and then delivered to the attorneys of record for the parties during the proceedings. He further reported that he had talked to Judge Riley on the telephone, and that he was willing to hear the supplemental report on January 20, 1956, at the same time as the report which the Master had filed earlier.

At this point the master again entered the hearing room and a discussion was had with reference to the recessing of the taking of the depositions in view of the fact it now appears that it

would be impossible to complete the deposition of Mr. Imel. Following a discussion it was agreed that the taking of the depositions of the plaintiffs Imel, Mitzner and Naber would be recessed until the further call of the Master at the conclusion of the proceedings today.

At this point there was distributed to Mr. McManus and Mr. Nady, as attorneys of record for the plaintiffs, and to attorneys for the defendants present, the notice and supplemental report of the Special Master filed today and each acknowledged that they had received a copy of the notice dated today and signed by the clerk, and a supplemental report of the Special Master also filed on this date. (The examination of Mr. Imel then continued.)

I know Johnny Kerwin. I have been in his presence along with some of the rest of the members. He was consulting with me in regard to the case. Mr. Kerwin was not employed by me. I don't know if he represents personally any of the other members of the Board. He was assistant to Mr. Strong. Harry Strong is the manager, and I suppose Mr. Kerwin would be assistant manager. I wasn't present when these arrangements were made. I don't know whether he served in a legal capacity or in a management capacity. I don't know what the arrangements are for fees or salary. I was not present at the meeting when he was elected. It has only been in the past few months or so. It is not of long standing. Mr. Kerwin lives in Rock Island. He is a practicing attorney. (Tr. 194-197, Deposition of Harry Imel)

The witness P. H. Naber was sworn but did not testify.

The hour having arrived for adjournment, the deposition proceedings were recessed as per the prior agreement, subject to the call of the Master. (Tr. 223, Deposition of Harry Imel.)

January 16, 1956

Filed order that motions to dismiss are granted as based upon Div. I, upon Div. III, Subdivision I, and upon Div. IX, Subdivisions 1 and 3; motions to dismiss are denied as based upon Div. II, upon Div. III, Subdivision 2, and upon Div. IV, Subdivision 2, without prejudice to renewal of motion to dismiss; motion to assess costs against plaintiffs is denied without

prejudice to its renewal; as per Para. 1 above, action is dismissed as to plaintiffs F. A. E. Gillmor and First Iowa Hydro Electric Cooperative, such dismissal to operate as an adjudication upon the merits, provided that such dismissal is expressly made subject to confirmation by the Court, Edward A. Doerr, Special Master. (Copies mailed to all plaintiffs, their attorneys of record and attorneys for defendants.) (R. 128)

January 17, 1956

Filed supplemental report of Special Master Doerr. (R. 131)

January 17, 1956

Filed Exhibit A to supplemental report of Special Master Doerr. (Tr. of proceedings on the deposition of F. A. E. Gillmor)

January 17, 1956

Filed order for hearing on supplemental report of Special Master Doerr to be held in Des Moines, Iowa, on January 20, 1956, at 9:30 a.m., Riley, J. (Copies mailed to all plaintiffs and attorneys of record.) (Said order is set out below:)

It appearing to the court that Edward A. Doerr, Special Master, has filed his Supplemental Report (to that filed herein on January 4, 1956) of dismissing this action as to plaintiffs F. A. E. Gillmor and First Iowa Hydro Electric Cooperative, of which the former is an officer and director, because of the failure and refusal of said F. A. E. Gillmor to testify as a witness at the taking of his deposition pursuant to Rules 28 and 30 of the Federal Rules of Civil Procedure scheduled to be taken at Davenport, Iowa, on January 10, 1956, at a time and place at which the said F. A. E. Gillmor was present in person;

And it further appearing that following such refusal of the said F. A. E. Gillmor so to testify, the defendants filed herein their motion to dismiss based in part upon said refusal and upon the failure of said F. A. E. Gillmor and First Iowa Hydro Electric Cooperative to pay into the registry of the court certain money in accordance with the orders of the court dated September 21, 1955, and September 27, 1955;

IT IS NOW ORDERED that the Supplemental Report of the Special Master shall come on to be heard before the court at Des Moines, Iowa, on the 20th day of January, 1956, at 9:30 o'clock a.m., together with other matters in this cause assigned for said time and place, and that notice of the hearing on said Supplemental Report shall be served upon the plaintiffs F. A. E. Gillmor and First Iowa Hydro Electric Cooperative personally by the Marshal, and that notice of said hearing shall be given by mailing to the other individual plaintiffs and their counsel of record and to counsel for the defendants a copy of this order.

January 17, 1956

Mailed notice with copy of supplemental report of Special Master attached to all plaintiffs, their attorneys of record and attorneys of record for defendants, setting date for hearing on supplemental report at Des Moines, Iowa, on Friday, January 20, 1956, at 9:30 a.m.

January 19, 1956

Filed petition of plaintiffs for review of an order made by Special Master on January 16, 1956. (R. 137)

January 19, 1956

Filed plaintiffs' exceptions and objections to report of Special Master filed January 4, 1956. (R. 134)

January 19, 1956

Filed plaintiffs' objections and exceptions to supplemental report of Special Master filed January 17, 1956. (R. 138)

January 19, 1956

Filed plaintiffs' motion to vacate order appointing Special Master. (R. 138)

January 20, 1956

(Abstract of proceedings before Riley, J., re defendants' motions to dismiss; the report of the Special Master of January 4th and of January 17th; plaintiffs' petition for review of the orders of the Special Master; objections and exceptions thereto; motion to vacate order of reference, and defendants' motion to strike plaintiffs' motion to vacate.)

Mr. J. R. McManus, Allan R. Shepherd, James D. France and Xavier C. Nady, attorneys of record for plaintiffs, were present and one or more of the attorneys of record for the defendants.

The Court announced that this was a hearing pursuant to his orders of January 9 and 17, 1956. The Court asked if there were any of the individual plaintiffs present or any officer of the corporate plaintiff, or anyone representing the corporate plaintiff other than attorneys of record who appeared at the counsel table. There was no response and the Court then requested of Mr. McManus that if any of the individual plaintiffs appeared or if any representative of the corporate plaintiff or any of the corporate plaintiff's officers or directors appeared that he call it to the attention of the Court. (Page 2, Tr. of January 20, 1956, proceedings)

The Court announced that he had for submission the motion of Union Electric Power Company, of October 11, 1955, Division I of which relates to the refusal of Strong to testify in the discovery proceedings and leaving the hearing room, and Division 2 of the motion having to do with the failure of all plaintiffs, corporate and personal, to make the deposit ordered by the Court. The Court then inquired as to whether or not the deposit had been made this morning and Mr. McManus replied that it had not been made to his knowledge, and that both of these matters were joined in Division 3; that the Court also had for consideration the report of the Special Master of January 4, 1956, and the Special Master's Supplemental Report of January 17, 1956, which had to do with the refusal of the plaintiff Gillmor to testify, and the petition for review of all the plaintiffs, filed by their counsel.

Mr. McManus stated that they had a petition for review of each of the orders of the Special Master; that they had also filed objections and exceptions to each of the reports, the

original report and the supplemental report, and in addition to that, yesterday (January 19, 1956) they had filed a motion to vacate the order of reference. The question as to whether or not the motion to vacate would be submitted at this time or postponed for a later date, the Judge announced that he would not expect the defendants to be in a position to submit it without further notice.

Thereupon Mr. Walker, on behalf of defendants, made an opening statement and argument on behalf of defendants. In connection therewith, the following proceedings occurred: (Tr. 8-24, Proceedings of January 20, 1956)

> "MR. WALKER: At the outset of my remarks, and through an abundance of caution, while we think that it is probably not necessary, there is some question in connection with the order of the Special Master so far as it relates to the failure of the plaintiffs to make the deposit of $2,500 which was required by the order of the Court of September 21st and the order of September 27th. That being true, and if there is any question in that connection as to whether or not the defendants should move in respect to the Master's order in that connection, I want to make a record here that we move that the Master's report in connection with the dismissal of the plaintiffs in connection with their refusal or failure to pay the $2,500 to the Receiver be set aside and that the Court decide that question at this time.
>
> THE COURT: I believe his order was without prejudice to the right—
>
> MR. WALKER: It was, sir. And I want it considered as renewed as of this time.
>
> THE COURT: Very well, it will be so considered."

Mr. McManus, as attorney for plaintiffs, and preparing to address the Court, raised the question again of the submission of the validity of the order appointing the Special Master. The Court stated, however, that it had been raised in his petition for review and that he was at liberty to discuss the same. The Court then made the following statement and the following record was made in reference to the proceeding in chambers

before the appointment of Mr. Cook as Special Master, in May of 1955, as follows:

"THE COURT: * * * * * Now, another thing perhaps should be said by the Court before you begin so that you may have an opportunity if you desire to discuss it because it is a matter that is not of record, and in making the statement I am relying on the memory of the Court, and that refers to a conference in my chambers in May, 1955 before the appointment of Mr. Cook as Special Master. Attending that conference were the four counsel of record for the plaintiff, and Mr. Walker.

"Mr. Walker, I just said to Mr. McManus before he proceeds I wanted him to know that the Court's recollection is, and I think it should be a matter of record, that I recall a conference in my chambers in May, 1955. I can't give you the exact date. It was attended by counsel of record for the plaintiffs and yourself, at which Mr. Holm, my law clerk, and I were also present, and at that time I informed counsel of my desire to appoint Mr. Cook as Special Master, and I called the attention of counsel for the plaintiffs to Mr. Cook's prior employment in years gone by by Iowa Southern Utilities, and I know by Iowa-Illinois Gas & Electric Company, but I said that because of my own knowledge of his objectivity, my long acquaintance with him as a splendid lawyer, his knowledge of the federal rules, and my desire to have him handle the questions that might arise in relation to these depositions to be taken, I wanted to name him Special Master. And I believe it is you, Mr. McManus, who suggested that you would like to confer with your co-counsel and you retired to my library where you had a brief conference, and came back and said the appointment of Mr. Cook would be very satisfactory.

"MR. McMANUS: That is correct, your Honor.

"THE COURT: I mention this only that if may be in the record, and you may to the extent you desire refer to it. That is all. You may proceed."

(Tr. 26-27, Proceedings of January 20, 1956)

The following further occurred when Mr. McManus stated:

"* * * I also want to call your attention to the fact that the conduct of Mr. Strong is his conduct. He is only one of four individual plaintiffs in the litigation. It is true that Mr. Gillmor followed his lead. The other three plaintiffs have appeared before the Special Master and have either testified in part, and that is true as to Mitzner and Imel, or have been put under oath and signified their intention of testifying, and that is true as to Mr. Naber, whose testimony was not taken but who did appear and was administered the oath and indicated his intention to give testimony.

"THE COURT: Isn't it true that Mr. Strong in addition to being director is its secretary-treasurer?

"MR. McMANUS: He is secretary-treasurer and general manager of the Cooperative.

"THE COURT: And that Mr. Gillmor, I believe, is president?

"MR. McMANUS: He is the president. That is correct, Your Honor.

"Now, it would seem to us that there are other methods of sanctions and other methods of describing the situation besides imposing the drastic sanction of dismissing the case as to the First Iowa Hydro Electric Cooperative and all the other plaintiffs.

"THE COURT: Well, let us have the first suggestion as to Mr. Strong. What would there be?

"MR. McMANUS: I will have to confess that I myself am unable to explain or to justify Mr. Strong's conduct on any reasonable or rational basis. I have not talked to Mr. Strong since the 31st day of August of 1955. As everybody knows in this room, there has been a dispute between counsel of record and the plaintiffs in this case, especially Mr. Strong, but recently that situation has changed with respect to Mr. Imel, Mr. Mitzner and Mr. Naber, so that Mr. Mitzner and Mr. Imel and Mr. Naber have counselled with us this week as late as Tuesday, and

apparently Mr. Strong is going down the same line that he has gone all along, by himself, but it has become increasingly apparent that the other directors are getting next to Mr. Strong, shall we put it.

"THE COURT: But I am interested in the other means that you suggest in handling it, and that is the reason I ask what about handling the problem as to Mr. Strong?

"MR. McMANUS: The Special Master, Your Honor, as I understand the law, possesses no power to commit a person for contempt of court. That is only a power vested in the district judge, so that the only sanction that he could apply on the motion and the record that was made before him was to sustain or recommend the sustaining of the motion to dismiss filed by the defendants because of his refusal and failure to testify, and his failure and refusal to put up the $2,500.

"Now, in a discussion of this kind I must be fair and honest and frank with the Court, that I am of the opinion that at all times they had the money to put up the $2,500, so that I don't know of any justification or excuse for the failure and refusal of First Iowa Hydro Electric Cooperative to make the $2,500 deposit into the registry of this court under the order that the Court has made, and I don't intend to attempt to justify that because the records of this court show that during the bankruptcy proceeding they produced in the neighborhood of $5,000. * * *" (Tr. 33-36, Proceedings of January 20, 1956)

Further proceedings were had as follows:

"MR. McMANUS: Yes. All right. Now, another question that I want to call Your Honor's attention to, and which was presented to Your Honor in connection with the brief that we filed last fall when the plaintiffs attempted to remove their present counsel and substitute other counsel, and that is this proposition—that the record in this court is without contradiction or dispute that these attorneys of record for the plaintiffs have an interest in the subject matter of this suit by reason of the contingent contract of employment and the nature of their contract of employment, and the work and time and effort they

have expended in this case, and we cited authorities to Your Honor, and I know Your Honor is familiar with them because you discussed on one occasion one of them with me which I believe was a District of Columbia case which held that the lawyers could appeal and had the right to appeal regardless of an attempt on the part of plaintiff to get other counsel, so that if this case were dismissed it deprives the attorneys for the plaintiffs, who are blameless and who are without wrong and who have to the best of their ability attempted to represent their clients in this proceeding, and penalizes them in a situation where they are helpless. We have advised all of these plaintiffs to testify and have requested them to testify, so that if this case is dismissed it penalizes the lawyers who are innocent of any wrongdoing. I, myself, will not attempt to explain or to justify or to excuse the conduct of Mr. Strong. Mr. Gillmor is a very old man who is under the domination of Mr. Strong and who is being led by Mr. Strong. If left to his own devices I am certain that Mr. Gillmor would do what was right. He is a high minded old gentleman possessed of his ideals, but he is being influenced and led by Mr. Strong, so that Mr. Strong by his wilfull conduct is penalizing the other four directors and the attorneys of record for the plaintiffs, so that I ask the Court to devise some means to keep the lawsuit in court in order to afford us time and opportunity to try to get the situation straightened out.

"THE COURT: Well, I would be glad to have the benefit of your suggestion, because the purpose after all is to get the testimony of Mr. Strong. He has been guilty of contumacious conduct as one could possibly be guilty of.

"MR. McMANUS: I agree with Your Honor.

"THE COURT: And if you can tell me how that can be accomplished I would be glad to have you suggest it. The Court doesn't like to have to use such drastic remedies. For example, in connection with the bankruptcy proceedings, as you know he was directed to turn over to the Receiver certain funds in his hands, and he defied the order of the Court and I had to direct his commitment until he obeyed the order of the Court. When that occurred he obeyed it.

"MR. McMANUS: I am told that at the hearing which occurred on December 20th when he again refused to testify, that on that occasion he wanted to know of counsel if he would be committed for contempt, if any attempt would be made to commit him for contempt if he failed to and refused to testify. When he felt that he would not be committed for contempt he then refused to testify, so that that is a matter which Your Honor might properly consider. Furthermore, the appeal of the cases of this kind is expensive for everybody concerned. It might be that if Your Honor saw fit in the interests of justice and in attempting to safeguard the rights of the other people who are interested in the case that I have mentioned, might see fit on your own motion to make an order giving Mr. Strong and Mr. Gillmor another opportunity to testify if Your Honor thinks that is proper in the due administration of justice.

"THE COURT: I would not consider this procedure when I look at the record of continuances that were granted at the request of Mr. Strong, and then his ultimate conduct. I can see nothing to be accomplished by that.

"MR. McMANUS: Now, Mr. Gillmor appeared before the Special Master last—a week ago last Monday and at that time refused to testify, and immediately the motion was filed and notice was given and it was set for hearing for Monday of this week, and Mr. Gillmor was not afforded any other opportunity to testify except the one, although he was aware of the consequences that had occurred to Strong by reason of his failure to testify, but it might be that if Mr. Gillmor was afforded another opportunity to testify that he might do so although I have not talked to him, Your Honor, and I wouldn't be able to assure the Court that he would do so.

"THE COURT: Very well." (Tr. 38-40, Proceedings of January 20, 1956)

The proceedings were recessed until 11:30 a.m., at which time counsel for defendants announced to the Court that they would agree that the hearing also encompass plaintiffs' "Motion to Vacate Order Appointing Special Master," filed January 19th, and thereupon defendants orally moved to strike the

motion because it was not timely filed and not filed within the time that such a motion should have been filed, either at or near the time of the appointment of the Special Master, and that it has not been filed timely thereafter. That the plaintiffs here have consented to the appointment of the master; that plaintiffs have further waived any right to make such a motion at this time and after the development of the case to this point without previously having made such a motion, and by reason of the fact that they have also invoked the authority of the master, proceeded under the master, have asked for extensions of time, relief and various other matters under the master, and have proceeded at all times under the jurisdiction of the master, and that the plaintiffs have by their actions and failure to file this motion within the time required acquiesced in the appointment of the master; and we therefore move that this motion be dismissed for the foregoing grounds. (Tr. 44-45, Proceedings of January 20, 1956)

Thereupon Mr. Maxwell A. O'Brien argued the motion to strike to the Court.

With further reference to the conference of May 16, 1955, previously referred to, the Court stated of record as follows:

> "THE COURT: I will interrupt you just long enough to say that my secretary's diary discloses that that conference took place on the 16th day of May, 1955, attended by Mr. Steele, Mr. McManus, Mr. O'Brien, Mr. Walker, Mr. Waterman, Mr. Bergstrom, Mr. Nady, Mr. France, and Mr. Shepherd. There was such conference. If there was a later one than that I don't have a note of it here."
>
> (Tr. 47, Proceedings of January 20, 1956)

In the argument to the Court Mr. Nady had expressed his opinion to the effect that a majority of the five-man Board of Directors of the First Iowa Hydro were not in agreement with the refusal of the President, Mr. Gillmor, and the Secretary-Treasurer-Manager Strong in refusing to testify, both of said parties also being directors. (Tr. 42, Proceedings of January 20, 1956)

In the reply argument Mr. Waterman, for the defendants, asked leave of the Court for permission for Mr. Shuttleworth,

also one of counsel for defendants, to read into the record certain statements from the deposition of Mitzner and the deposition of Imel, individual plaintiffs and directors of First Iowa Hydro, to refute the opinion expressed by Mr. Nady, Counsel of plaintiffs. The following thereupon appears in the record, to-wit:

"THE COURT: Well, I am supposed to take judicial notice of it but it will clarify it very readily if you will read it.

"MR. WATERMAN: These depositions were taken subsequent to the order for this hearing.

"MR. SHUTTLEWORTH: May it please the Court. These are short. I should like to read into the record from Volume 1 of the deposition of Carl J. Mitzner, taken last Monday, January 16, 1956, the statement of the plaintiff Mitzner appearing and starting on page 17 of that transcript.

" 'Because of the position that I have taken here in signing these papers, discharging our attorneys as of record, and the various documents that have followed as a natural course of that, I feel I am without counsel, and the question you have just asked, Mr. Walker, I would very much—what shall I say?—hesitate or dislike answering it without counsel.

" 'Now, if the Court should see fit to permit me to procure other counsel and give me time to prepare myself, then I think possibly I could answer questions.

" 'I would say this to you gentlemen here, and the Court, the depositions which you have taken from Mr. Strong are so much more—what shall I say?—relevant to the lawsuit in process than any information which I can supply, that I feel that you are wasting both your time and mine in merely questioning me.

" 'I presume it is a legal and proper move, but one with which I am not acquainted, and being a farmer, I just think as a farmer. There are many times when I must husband my time very carefully to get done the things I have to do, and this has led me to this kind of thinking.

" 'Mr. Strong has the records. Repeatedly we have delegated him as our manager and representative in these things.

" 'So much of the time I was not present at even a few of these hearings.'

"MR. SHUTTLEWORTH: And then he goes on, but I have concluded at the bottom of page 18.

"THE COURT: In the portion from which you read was he represented by counsel at all?

"MR. SHUTTLEWORTH: Counsel of record were there at that time and place, Your Honor.

"THE COURT: And did they participate in the record that was made following what you have read?

"MR. SHUTTLEWORTH: Yes, they did.

"THE COURT: Very well. Now go ahead with your other.

"MR. SHUTTLEWORTH: I would like then to refer to the testimony of Mr. Harry Imel in his deposition taken Tuesday, January 17, 1956. At page 8 of this deposition I would like to read the following questions and answers:

" 'Q. How long have you been a Board member?

" 'A. I think it was in 1953. The records show—I think it was in January, 1953. I came on as a director.

" 'Q. And that was the first time you had acted in the capacity as a director?

" 'A. As a director, yes.'

"MR. SHUTTLEWORTH: Then I should like to read the transcript of the deposition at page 19 of Mr. Imel:

" 'Q. Well, that reminds me of a question I wanted to ask you, Mr. Imel.

" 'Harry Strong organized the First Iowa Hydro Electric Cooperative, did he not?

"'A. I think that happened, Mr. Walker, before I came to Iowa.

"'Q. Do you know that, though, to be a fact?

"'A. I believe that he did. I believe in conversations that I have had with the various people in the past that Harry Strong was the one that organized First Iowa.

"'Q. During the period that you were on the Board of Directors of the First Iowa Hydro, was Harry Strong the actual moving force of the project?

"'A. Yes, in this respect: I think the Board of Directors kind of believed in him. We know what he had been doing. We have left it up to him.

"'Q. Mr. Strong has been the only man who has devoted his full time to the First Iowa Hydro Electric Cooperative?

"'A. To my knowledge, yes.'

"MR. SHUTTLEWORTH: Thank you, Your Honor.

"THE COURT: Very well, you may proceed, Mr. Waterman." (Tr. 52-55, Proceedings of January 20, 1956)

It appeared and was noted of record that at the close of the proceedings before the Court none of the plaintiffs had appeared in person, and that no officer or director of the plaintiff Cooperative had appeared. (Tr. 62, Proceedings of January 20, 1956) At the conclusion of the arguments the Court commented upon the matters submitted as follows:

"Well, gentlemen, I regard as submitted the matters covered by my orders of January 9 and 17. I think I should say at this time that I have been dealing with some of the matters that were covered by the chronology of Mr. Waterman and of other counsel for a good many months. We go back, as a matter of fact, to the commencement of the lawsuit, but I mean with the matters in which I think were involved what I can only describe as the contumacy of the plaintiffs Strong and Gillmor and their complete disregard for the orders of this Court.

"I have been kept informed by the master of the progress of these hearings. This is not a matter of first impression with me today. The whole matter has had long consideration, and I confess that there has been considerable concern on my part, as the judge who happens to occupy for a brief period a position of judge in the Southern District of Iowa, as to what the effect might be of conduct such as this in the administration of justice here in the Southern District. I believe I have gone a great deal further than as a practicing lawyer I would have considered it my obligation as a judge to do because I didn't want any hardship to result as far as anyone was concerned, and I wanted to give every opportunity to all litigants involved to have a fair and full opportunity to have their rights protected. I say perhaps I have gone further than I should. Nevertheless, I have no apologies for what I have done from the time that the first action was taken by the plaintiff Strong that began to show a disregard for the orders of this Court. He has been acting with increasing provocation, and his conduct has been definitely contumacious.

"Unfortunately, when I came to the matter of the bankruptcy proceedings, which are unrelated to this proceeding, the proceedings affecting the corporate plaintiff here, I found it necessary to commit Mr. Strong to jail to make him obey the orders. He obeyed them promptly. He has shown flagrant disregard for orders of the Special Master. He has secured continuances, and I can only infer now that they were not obtained in good faith because it is evident from the record that he didn't intend to testify. At least that is the conclusion that I draw.

"I appointed Mr. Cook as Special Master with full knowledge on his part, on the part of his associates and his counsel of matters that I referred to earlier in the record this morning, and yet the first time that there was a difference between Mr. Cook's order and what Mr. Strong desired to do, which had to do with these very funds about which counsel spoke in oral argument, and from which time apparently the trouble has stemmed, plaintiffs were in this court with an attack on Mr. Cook that I considered very unwarranted, very unfortunate for

such a respected member of this bar. Later when a conflict of interests developed that he had not anticipated at the time of his appointment, he asked me if he might resign. He tendered his resignation and I appointed the present Special Master, Mr. Edward A. Doerr. I don't recall whether it was before or since that time that an effort was made to disqualify me; and there have been two trips made to the Circuit Court of Appeals in connection with this matter. None of those things have given me the least feeling one way or the other. I still am as eager to protect the rights of all of the plaintiffs in this case as I am to protect the rights of all of the defendants, and to protect the rights of counsel for plaintiffs as those of counsel for the defendants. I consider it my duty as a judge.

"Now, as to these matters, I entered an order on September 21st at the time of the appointment of Mr. Doerr, directing parties plaintiff and part of parties defendant each to deposit in this court—pay into the registry of this court $2,500 to defray the expenses of the Special Master. The defendants made such payment. The plaintiffs haven't up to this time, although the record as offered here this morning, and as disclosed in the bankruptcy proceedings, of which I must take notice, indicate that the corporate plaintiff had more than that amount of money in its possession since the order. I consider that as complete a disregard of the order of this Court as any of the other conduct of the plaintiff. So for that reason the motion should be sustained, and is sustained as to all of the plaintiffs.

"Now we come to the report of the Special Master, the one filed here under date of January 4, 1956 having to do with the refusal of Mr. Strong to testify. He was an executive officer, the manager, secretary and treasurer of the corporate plaintiff. I consider that portion of the order of the Master under date of December 22nd, and I quote from it—well, I will say first the dismissing as to the plaintiff Strong and the corporate plaintiff—and I quote from the order: 'Such dismissal to operate as an adjudication upon the merits.' I consider those words surplusage in his order because I don't think he has a

right to make that determination, but he may recommend to this Court, and I take his language as surplusage so far as an order is concerned, but as a recommendation to this Court that dismissal be of that character, and I sustain his order, approve his report and recommendation, and I consider the dismissal as to the plaintiff Strong and the corporate plaintiff to operate as an adjudication upon the merits.

"So far as his report of January 17, 1956 is concerned, which is a supplemental report dealing with the contumacious conduct of the plaintiff Gillmor, who is the president of the corporate plaintiff, and because of whose contumacy and disregard of the orders of the Master he recommended his dismissal, and I accept it only as a recommendation, as to the plaintiff Gillmor and the corporate plaintiff I approve his recommendation and adopt it, and I consider that this dismissal is to operate as an adjudication upon the merits.

* * * *

"Now, so far as the motion to the Court to vacate the order appointing the Special Master is concerned, I sustain the motion of Mr. O'Brien. I consider it not timely, and I consider that the failure of plaintiffs at the time of the appointment of the Special Master to move for a vacation of that order within a reasonable time thereafter—I mean to move the Court to enter the order, and who alone can vacate the order—is a waiver of their right to make such a motion at this time, and I deny them that right, and sustain the motion of Mr. O'Brien to strike this motion to vacate.

* * * *

With respect to the court costs, the Court further commented that the costs would be divided equally between the plaintiffs and the defendants, including all costs and the fees of both Mr. Cook, Special Master, as well as the fees of Mr. Doerr, Special Master. Thereupon the hearing was adjourned. (Tr. 80, Proceedings of January 20, 1956)

January 24, 1956

(Abstract of proceedings before Riley, J., re memorandum of decision and order for judgment.)

On January 24, 1956, the attorneys representing the defendants appeared in open court for a discussion with the Court regarding the proposed Memorandum of Decision and Order for Judgment. The Court announced that Mr. McManus had called before noon and talked to Mr. O'Brien concerning the form of the order, and that he had had no opportunity to look at it or would have none, and that he was reluctant to do so without the association of his other counsel. The Court continued by stating of record that Mr. McManus had informed him that he had talked to Mr. Nady, of Tipton, by long distance telephone, and that Mr. Nady could be here tomorrow morning at eleven o'clock, and I told him I would take the matter up at eleven o'clock. Under the circumstances and because of the importance of the matter, I felt that in fairness to them the opportunity should be afforded and consequently we will do that.

January 25, 1956

Filed retraction signed by Carl J. Mitzner and P. H. Naber. (Said retraction is set out below:)

The undersigned, being members and directors of the plaintiff First Iowa Hydro Electric Cooperative, and also plaintiffs in the above entitled cause each for himself hereby retract and withdraw each and every charge and accusation made by plaintiffs in a "Motion to Discharge Plaintiffs' Counsel of Record" filed in the above entitled cause by plaintiffs; and state that they have investigated the facts and find that all charges of misconduct and accusations derogatory of plaintiffs' counsel of record made in said motion or in any other pleadings filed or attempted to be filed that in any way reflect unfavorably upon said counsel were false, and that the undersigned are now convinced that the attorneys of record have loyally, honestly, and to the best of their ability served and represented plaintiffs in this case at every stage of the proceedings.

The undersigned further state that by reason of lies and misrepresentations which were made to them, upon which they relied, they were induced to sign the motion to discharge counsel, and they are now of the opinion that they should not have believed the statements and misrepresentations which were made to them, and that the same were unworthy of belief and untrue. The undersigned further state that had they not believed the lies which were told to them they would not have signed said motion to discharge their counsel.

The undersigned now state that they have confidence in the integrity of counsel of record for plaintiffs; that they believe that said lawyers have been guilty of no misconduct, and that in all matters connected with this litigation said attorneys have ethically conducted themselves in accordance with the highest standards of the legal profession. The undersigned desire to retain and continue in this litigation with their present counsel of record, namely, France, France and Nady of Tipton, Iowa, James R. McManus and Allan R. Shepherd of Des Moines, Iowa, and we desire that this court know that all charges made against said counsel by plaintiffs were baseless and without foundation in fact and are now convinced that said misrepresentations were ruthlessly manufactured by a person seeking to serve his own selfish ends and purposes.

CARL J. MITZNER,

P. H. NABER.

January 25, 1956

(Abstract of proceedings before Riley, J., re memorandum of decision and order for judgment.)

A further hearing was held pursuant to the order of the Court on January 25, 1956, at 11:00 a.m., for the purpose of allowing counsel for plaintiffs to make any objections and exceptions they might have to the proposed Memorandum of Decision and Order for Judgment. Mr. James R. McManus, Mr. Allan R. Shepherd, Mr. James D. France, and Mr. Xavier C. Nady appeared as attorneys for plaintiffs, and the defendants were represented by one or more of their attorneys of record.

Mr. McManus advised the Court that he had had an opportunity to review the proposed Memorandum of Decision and Order for Judgment, but that Mr. Nady had not had time to complete the reading of it, and that Mr. France had only read it hastily. Accordingly the Court recessed until twelve o'clock to give plaintiffs' counsel a further opportunity to examine the proposed Memorandum of Decision and Order for Judgment. (Tr. 87, Proceedings of January 25, 1956)

The Court inquired of Mr. McManus if he had now had an opportunity to review the proposed Memorandum of Decision and Order of Judgment. Mr. McManus replied that he had and the arguments, statements and remarks of the Court and counsel for plaintiffs are set out, to-wit:

"THE COURT: And you may make such record as you desire.

"MR. McMANUS: At the outset, in behalf of myself and my associates I want to express our appreciation for the courtesy Your Honor has extended to us in affording us the opportunity to go over this long Memorandum of Decision and Order for Judgment. We have all read it over, and at this time if Your Honor will permit me to, we would like to make into the record certain objections and exceptions to the form and content of it. Is that agreeable with the Court?

"THE COURT: I may before you proceed say that a very substantial part of it has to do with this chronology of events to which I referred. You may proceed.

"MR. McMANUS: I wonder if Your Honor would care to indicate how much time you think would be appropriate for us to use for this purpose? I am thinking of Your Honor's own schedule and program. I wonder if you would care to indicate how much time we may be afforded for that purpose?

"THE COURT: Well, I want to give you time to make your objections to it. Go ahead and make them.

"MR. McMANUS: Very well, Your Honor.

"The plaintiffs through their counsel now except and object to the proposed form and content of the Memoran-

dum of Decision and Order for Judgment which has been given to us by the defense counsel for each and all of the following reasons:

"First, we except and object to the form and content of said Memorandum of Decision and Order for Judgment for the reason that this case is not an appropriate proceeding for the filing of findings of fact and conclusions of law. Findings of fact and conclusions of law, under the rules of civil procedure, may be filed in certain non-jury cases where there is a hearing and trial and disposition of the issue and the subject matter of the action, but in our judgment they are inappropriate whereas in this situation the matters which were before the Court for decision on last Friday were purely legal questions raised by the reports of the Special Master of January 4th and January 17th, the two petitions for review, and the two objections and exceptions challenging the reports of the Special Master that I have mentioned, and the motions which were orally dictated into the record by defense counsel on that date, and the motion to vacate the order of reference, so that we feel that a final order disposing of this case should consist of what was before the Court for decision—the appearances, the rulings denying or sustaining or approving the petition for review, exceptions and objections, and the reports of the Special Master, an order giving effect to those rulings, and an order making disposition of the matter of costs, and that those are the matters that would be proper for a final order making disposition of this case, and that this case is not a case for the filing of findings of fact, and the findings of fact would not be binding on us, and the chronology that is set forth in the Memorandum of Decision can be found in the records and the proceedings of the Court.

"Now, in the first sentence of the Memorandum of Decision it is recited: 'The following matters were heard by the Court with consent of all parties and were submitted on January 20th, 1956.' Then in the very first paragraph it is stated 'The motion to dismiss filed October 10, 1955, was for submission.' Now we except and object to that statement for the reason that no order has ever been made setting down for submission before the Court the motion

to dismiss filed on October 10, 1955. It arose before this Court only on the report of the Special Master, our petitions for review, and our objections and exceptions thereto.

"In the order made by the Court on January 9th, I believe, 1956, Your Honor indicated that he was going to hear on January 20th the report of the Special Master with respect to the matters covered by his report and perhaps his order.

"As I understand this record, the Special Master sustained a motion to dismiss on December 22nd insofar as it related to the plaintiffs First Iowa Hydro Electric Cooperative and Harry J. Strong, and that is as far as that order went with respect to acting on that motion to dismiss which had been filed on Ocober 10th. So we do not regard the motion to dismiss as having come before the Court on Friday, January 20th, 1956, and that that motion was not before the Court except with respect to the failure to deposit money in the registry of the court, which was referred to the Court in the order made by the Special Master on January 16th, 1956. So that we take the view that the motion filed October 10th asking a dismissal as to all plaintiffs was not before the Court on Friday the 20th.

"Now, as we understand this record, the Special Master never undertook to dismiss the case as to all plaintiffs until he made his order of January 16th, 1956. That is our understanding of this record. So we do except to those statements contained in paragraphs one and three of the findings.

"Now, on page three, the last sentence in the first paragraph recites: 'In conformity with the rules the Court makes findings of fact,' and then these findings of fact commence which are numbered paragraphs 1 to 37, inclusive. And we except and object to the filing of those findings of fact, and contend they are in no way binding upon us, and that the Court had no power, authority or jurisdiction to make them under the rules of civil procedure, and that they are inappropriate in a proceedings of this kind inasmuch as there has been no hearing or trial and no occasion for the filing of findings of fact and conclusions of law with respect to these matters of record in the case.

"Now, if Your Honor please, at the bottom of page eight in paragraph two under the caption 'General,' where the Court has said 'The Court makes the following additional findings of fact,' in the last sentence in paragraph number two at the bottom of page eight the Court says: 'I find that plaintiffs have initially consented to the appointment of a Special Master.' It is true that we initially consented to the appointment of a Special Master in the person of Wayne G. Cook for the purpose of supervising the discovery deposition proceedings. We never at any time consented to the appointment of a Special Master with the broad general powers given by the order of September 21, 1955 appointing Edward A. Doerr as Special Master.

"THE COURT: Except perhaps as your admission may have been implied from your failure to take any exception to it by motion to vacate or otherwise until the motion was filed on Friday last.

"MR. McMANUS: I understand Your Honor's viewpoint in that connection.

"THE COURT: Yes. Very well.

"MR. McMANUS: In that connection I also say that on each and every occasion when we did appear before the Special Master the order appointing Edward Doerr as Special Master was challenged.

"THE COURT: Of course, Edward Doerr did not issue that order.

"MR. McMANUS: That is true. And all proceedings before the Special Master were by the record without prejudice to our challenge of the right of the Court, and the validity of the order, to appoint the Special Master. So that at all times and in every appearance before him we did raise that question, but we filed no motion to vacate the order of reference until the 19th day of January, 1956.

"Now, I don't raise any question but what we consented to the order appointing Mr. Cook in the first place with the supervisory powers that were given him by that order, but we never consented to the appointment of a Special Master with the broad powers given him by the order of September 21st, 1955, appointing Mr. Doerr.

"Now, many of the findings are replete with conclusions, and the matters are all record facts, and the records show exactly what did happen, and for that additional reason we take the view that it is not appropriate that the Court make any findings of fact and conclusions of law.

"Now, furthermore, the original order of the Special Master with respect to the motions to dismiss filed by the various defendants applied only to Harry Strong and the First Iowa Hydro Electric, and the second order made by him on the 16th of January, 1956, applied only to a dismissal of the cause with respect to F. A. E. Gillmor and the plaintiff First Iowa Hydro Electric Cooperative, so that until this order was made by Your Honor verbally into the record on the 20th day of January, 1956, no order had been made yet in this litigation with respect to the matter of dismissal as to all plaintiffs in the case, corporate and individual.

"We take the view that that matter was not before the Court on the 20th day of January, 1956, and we had no notice that the Court was going to take up the motion made by defendants on October 10th, 1955. So that we think that the Court was without jurisdiction to act on the motion made.

"THE COURT: The order entered when, you say?

"MR. McMANUS: The verbal order that Your Honor made on last Friday, the 20th, was the first order that had been made in the course of this litigation, as I understand the record, purporting to dismiss the case as to all plaintiffs, corporate, and individual, and personal. So that we feel that that order dismissing the case as to all plaintiffs should not have been entered, and shouldn't be entered in this Memorandum of Decision for the reasons given.

* * * *

"MR. McMANUS: Now as I read the last paragraph it contains this provision: 'Fees and disbursements of Edward A. Doerr shall be paid within ten days of entry of this judgment.' Now if Your Honor is going to enter this order at this time in this form it would seem to me that more than ten days should be afforded for the pur-

pose of raising the money to pay or for the purpose of applying for and obtaining an appropriate supersedeas or appeal bond in this case.

"THE COURT: So far as the time is concerned, I am willing to extend that time. I would extend that time to thirty days if you desire.

"MR. McMANUS: Well, I think it would be more appropriate if Your Honor would see fit to do that, and I want to make that suggestion without in any way waiving any of these questions that I have raised in the objections.

"THE COURT: Oh, I wouldn't consider that you would have waived any rights by making that request, and I will insert the word 'thirty' in here.

"MR. McMANUS: Mr. Nady has brought to my attention the fact that it was in Your Honor's order of September 21, 1955 appointing Doerr as Special Master that you ordered the deposit of $2,500 by the plaintiffs and defendants.

"THE COURT: That's right.

"MR. McMANUS: Which is no doubt true. So that we also challenge all of these proceedings upon the basis of the validity of that order. I am aware of the fact that under certain circumstances and conditions the Court would have the right to make such an order with respect to the deposit of the funds under appropriate circumstances. I don't challenge—

"THE COURT: With regard to what?

"MR. McMANUS: I say I do not challenge the right of the Court under certain conditions to make an order for the deposit of funds. I don't think the situation existed here which would warrant the Court in doing it, and we have raised all the way through the question with respect to the validity of Your Honor's order. Your Honor has his views that we should have done that by a motion earlier than we did, and I am content to rest on the record that has been made in that regard. I am obliged to as a matter of fact.

"That is all that I, myself, have to say with respect to the form and content of this order, except to say again that we think that all these findings of fact and conclusions of law have no proper place in a proceeding of this kind. There has been no hearing had, no trial, no issues submitted, and nothing but legal questions arising out of matters which were for submission on Friday last.

"Thank you, Your Honor." (Tr. 89-97, Proceedings of January 25, 1956)

"THE COURT: * * * * If I have erred in attempting to inform the reviewing court too fully, well, it will be the kind of error that I am perfectly willing to commit because I think they should have all of the information and background that they can. I find no reason to repeat what I attempted to say the other day that while my experience on the bench is not long, I have never encountered such contumacious conduct—I would say almost contumelious as has been disclosed in this matter, and I want the appellate court to have everything before it that it can that will disclose at least that the trial court has tried not to act with unseemly haste." (Tr. 98-99, Proceedings of January 25, 1956)

January 25, 1956

Filed memorandum of decision and order for judgment, Riley, J., and entered judgment. (R. 139, 154)

January 30, 1956

Filed Notice of Hearing and Supplemental Report of Special Master with Marshal's Return—"I hereby certify and return that the annexed Notice of Hearing and accompanying exhibit came into my hands on January 17, 1956, at Davenport, Iowa, and that on January 17, 1956 I served the same on the within named F. A. E. Gillmor by leaving a true copy thereof with Robert Gillmor at the usual place of residence of the said F. A. E. Gillmor located on Sec. 27, Allen's Grove Township,

Scott County, Iowa, the said Robert Gillmor being a person of proper age and discretion residing therein, Roland A. Walter, U. S. Marshal. By /s/ Don A. Davis, Deputy, Marshal's Fee $5.00."

February 16, 1956

Filed notice of appeal of First Iowa Hydro Electric Cooperative, F. A. E. Gillmor, Harry J. Strong, and Harry Imel from judgment entered on January 25, 1956, said notice being filed by J. Roger Wollenberg as attorney. (R. 155)

February 16, 1956

Filed mandate of U. S. Court of Appeals dismissing appeal from the order entered October 28, 1955, taken by F. A. E. Gillmor, Harry J. Strong and P. H. Naber, February 13, 1956. (Notice of entry mailed to all plaintiffs, their attorneys of record, attorneys of record for all defendants and Special Master.)

February 23, 1956

Filed notice of appeal of First Iowa Hydro Electric Cooperative, F. A. E. Gillmor, Harry J. Strong, Carl J. Mitzner, Harry Imel and James D. France, Xavier C. Nady, James R. McManus and Allan R. Shepherd from final judgment entered on January 25, 1956. (Said notice is set out below.)

NOTICE OF APPEAL

Notice is hereby given that First Iowa Hydro-Electric Cooperative, F. A. E. Gillmor, Harry J. Strong, Carl J. Mitzner, Harry Imel, and P. H. Naber, Plaintiffs above named, and James D. France, Xavier C. Nady, James R. McManus and Allan R. Shepherd, and each of them, as attorneys of Record, for the above named Plaintiffs, and in their own behalf, hereby appeal to the United States Court of Appeals for the Eighth

Circuit from the final judgment entered in this action on the 25th day of January, 1956.

JAMES D. FRANCE,
XAVIER C. NADY,
ALLAN R. SHEPHERD,
JAMES R. McMANUS,

As Attorneys of record for Plaintiffs and in their own behalf as such attorneys of record.

JAMES D. FRANCE,
XAVIER C. NADY,
JAMES R. McMANUS,
ALLAN R. SHEPHERD,

417 Fleming Bldg.,
Des Moines, Iowa,
Attorneys for Plaintiffs-Appellants.

February 23, 1956

Filed receipt of Special Master, Edward A. Doerr, for $1,822.78 paid by Boyd, Walker, Huiskamp & Concannon covering ½ of his statement for services as per order of January 25, 1956.

March 19, 1956

Filed designation of record in this Cause, No. 15,548. (R. 157)

March 23, 1956

Filed deposition of Gillmor, Naber, Mitzner, Imel.

Office Supreme Court, U.S.
FILED
SEP 12 1957
JOHN T. FEY, Clerk

No. 457

IN THE

Supreme Court of the United States

FIRST IOWA HYDRO ELECTRIC COOPERATIVE, F. A. E. GILLMOR, HARRY J. STRONG, AND HARRY IMEL,
Petitioners,

v.

IOWA-ILLINOIS GAS AND ELECTRIC COMPANY, IOWA POWER AND LIGHT COMPANY, IOWA SOUTHERN UTILITIES COMPANY ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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FIRST IOWA HYDRO ELECTRIC COOPERATIVE, F. A. E. GILLMOR, HARRY J. STRONG, AND HARRY IMEL, *Petitioners,*

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

OPINIONS BELOW

The opinion of the court of appeals (App. 1a[1]) has

[1] The appendix to this petition is cited herein as "App". The printed record in the court of appeals is cited as "R". References to appellees' supplemental printed record in the court of appeals will be cited as "Supp. R." Pursuant to Rule 21(3), nine copies of the portions of the record printed for use of the court below are being filed with this petition. In the event of a grant of the petition for certiorari, petitioners may file with this Court additional portions of the original record in the district court, which were also part of the record before the court below.

not yet been reported. The Memorandum of Decision and Order for Judgment of the district court appears at R. 139-154.

JURISDICTION

The judgment of the court of appeals was entered on May 24, 1957 (App. 32a). On August 15, 1957 an order extending to and including September 12, 1957 the time within which to file a petition for writ of certiorari was signed by Mr. Justice Whittaker. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

In an action for damages and injunctive relief under the antitrust laws, the district court referred the "entire cause" to a special master "to hear the evidence" and to make "where necessary special findings of fact and conclusions of law", such powers to be exercised until otherwise limited by order of the court. In proceedings before the special master on a motion by petitioners for leave to remove attorneys who had publicly manifested hostility to petitioners and had made statements in the proceedings materially adverse to petitioners, the special master refused leave to replace the attorneys unless petitioners first paid substantial fees to them, and refused to permit petitioners to file pleadings before the master or the court other than through their attorneys. Petitioners, effectively without counsel, failed to comply with orders of the court requiring deposit of funds to defray fees and expenses of the master and with respect to continuing to submit themselves as witnesses in pretrial deposition proceedings. The district court dismissed the action with prejudice and the court below affirmed.

The questions presented are:

1. Whether the reference to the master constituted an unlawful abdication of the responsibilities of the district court in violation of the rule of *LaBuy* v. *Howes Leather Company*, 353 U.S. 249.

2. Whether petitioners were deprived of their constitutional right to be represented by counsel of their choice.

3. Whether it was reversible error to dismiss the antitrust suit with prejudice on the basis of conduct of petitioners directly flowing from orders of the master in effect compelling them to be represented by counsel not devoted to their interests.

STATUTES INVOLVED

The pertinent constitutional and statutory provisions are set forth in the Appendix, *infra* p. 33a.

STATEMENT

Introduction

Petitioners seek review of a judgment of the court of appeals (App. 32a) affirming a dismissal, with prejudice, of an antitrust suit by petitioners against respondents (App. 2a).

The case was never tried on the merits. Dismissal was ordered as a penalty for certain alleged misconduct of petitioners occurring during the course of pretrial discovery proceedings (R. 152-153). Petitioner had failed to make a deposit ordered by the court to defray expenses and fees of a special master, and

certain individual petitioners had refused to continue to submit themselves as witnesses in deposition proceedings (App. 2a-3a). The allegedly contumacious conduct occurred under circumstances in which a series of orders of the special master had effectively deprived petitioners of the opportunity to select their own attorneys, except upon oppressive conditions, and of the opportunity to obtain review by the district court of the special master's orders (R. 70-76, 103-107).

The Parties and the Complaint

Petitioner First Iowa Hydro Electric Cooperative (hereinafter sometimes called "First Iowa" or "the Cooperative") is a non-profit Iowa association licensed by the Federal Power Commission to construct and operate a hydro-electric project to generate, sell and distribute electric power within a multi-state area including Iowa and neighboring states.[2] The individual petitioners are members of the Cooperative who were also plaintiffs below (App. 3a).

Respondents are power companies which operate in the area proposed to be served by the Cooperative, and an unincorporated association of which the corporate respondents are members (R. 16-17). The complaint alleges that the corporate defendants have controlled 90% of the business in the sale and distribution of electric light and power in Iowa, Southwestern Wisconsin, Western Illinois and Northeastern Missouri (R. 17).

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[2] For earlier litigation involving issuance of this license see *First Iowa Hydro Electric Cooperative* v. *Federal Power Commission*, 328 U.S. 152 and *State of Iowa* v. *Federal Power Commission*, 178 F. 2d 421 (C.A. 8), cert. den. 339 U.S. 979.

The complaint charges a conspiracy among respondents to monopolize the generation, transmission, distribution and sale of electric light and power in the area served by them (R. 18-20) in violation of the Sherman and Clayton Acts (R. 15).[3] It is charged that respondents engaged in deliberate and continued activities designed to prevent and having the effect of preventing the Cooperative from obtaining financing for its proposed project and charged agreement among them to join together to oppose the proposed project and to refuse to use any power produced by the project if it should be built (*ibid*). As has been noted, the merits of the complaint were not heard by either of the courts below.

The Appointment of the Special Master and the Deposit Order

The special master whose orders led to the dismissal of this action (Mr. Doerr) was the second special master appointed in the proceedings, a former special master with carefully limited powers (R. 23) having resigned after his impartiality was challenged (App. 12a). The order appointing Master Doerr was phrased in sweeping terms, providing (App. 14a):

> *that this entire cause be referred to him for such proceedings as may be necessary,* to hear the evidence, to take testimony on any issue herein, to pass on disputed claims, to pass on applications of the parties and to make where necessary special findings of fact and conclusions of law thereon and to report the same to the court, and these powers he shall exercise until otherwise limited by order of this court. [Emphasis supplied.]

[3] Act of July 2, 1890, Sections 1, 2, 7, 26 Stat. 209 as amended, 15 U.S.C. 1, 2, 7; Act of October 15, 1914, Sections 1, 4, 5, 7, 38 Stat. 730 as amended, 15 U.S.C. 12, 15, 16, 18.

The order of reference recited as justifications mainly that the issues were abnormally complicated, that extended discovery proceedings were in progress, that there was a controversy between petitioners and their counsel, and that the court's docket was crowded (App. 13a). The order also required petitioners and respondents each to pay $2500 into the registry of the court to provide for payment of fees and disbursements of the master (R. 50).

A motion by an individual petitioner, *pro se*, requested deferment of this deposit until petitioners could be advised by new counsel in the matter (the motion to dismiss the attorneys of record being then pending) (R. 41, 50). The court summarily denied the deferment request (R. 52), noting in its order of denial that "The powers of the master appointed Sept-21, 1955, are deliberately and intentionally broad and the matter of depositions is but an incident of his power and duties" (R. 53).

After the master had proceeded under this broad delegation of authority for several months, and had gone so far as to enter an unqualified order of dismissal against two of the petitioners (R. 115), the district court issued an order construing the original order of reference to the effect that the order "does not and cannot deprive plaintiffs of their right of trial by jury * * *, nor does it empower the Special Master ultimately to hear and determine the issues between the parties upon a trial of this cause" (Supp. R. 125). This interpretation was rendered in January 1956, shortly prior to the entry of the court's final judgment of dismissal.

The validity of the order appointing the master was challenged repeatedly by petitioners' counsel of record

(R. 1, 5, 7, 12, 117-118, 134-136, 137-138, 138-139). The early objections were filed before the master, who, on one occasion, ruled them premature (R. 1) and on later occasions overruled them on the merits (*e.g.* R. 5, 7), but who never ruled that he lacked power to pass upon them. He repeatedly ruled that participation in the proceedings would not be construed as a waiver of objections to his appointment (*e.g.* R. 5, 7, 12, 114). In addition to the objections filed by the attorneys, petitioners, acting *pro se,* petitioned the court to vacate the order of reference (R. 89, 93), but this request was stricken by order of the master (R. 103, 106).[4]

The Proceedings for Removal of Petitioners' Attorneys

At one stage in the proceedings in the district court, petitioners sought to associate additional counsel in the case after notifying their attorneys of record (R. 31). Without notice to petitioners the attorneys of record filed a motion to quash the appearance of the new counsel (R. 28). Thereafter, petitioners moved for leave to dismiss their attorneys of record in a sworn pleading alleging specified misconduct and asserting a complete loss of faith in these attorneys (R. 41-47).

The resistance filed by the attorneys (R. 54) is the first of a series of unrestrained attacks upon their clients by attorneys *who nevertheless insisted upon the right to continue to represent them.* Thus, *inter alia,*

[4] In the opinion of the court of appeals it is inaccurately stated that no objections to the master's appointment were made to the district judge by petitioners until January 19, 1956 (App. 27a) which was some four months after the order appointing the master. The above-mentioned *pro se* pleading was filed on October 17, 1955 (R. 86).

petitioners were accused by their attorneys of "a fraudulent conversion of trust funds" (R. 57), "fraud and perjury" (R. 59) and "seeking to perpetrate a fraud upon this court and to use this court and this lawsuit as an instrument for the commission of a fraud" (R. 62).

The special master scheduled a hearing on petitioners' removal motion (R. 160). On the day of the hearing certain of petitioners appeared personally before the court of appeals to prosecute a petition for leave to file a petition for a writ of mandamus and injunction and seeking a stay of all proceedings in the district court.[5] Although the special master was advised that petitioners were then seeking extraordinary relief from the court of appeals and a continuance was requested, he nevertheless proceeded with the hearing on the removal motion in the absence of petitioners (R. 1-2).

Although the attorneys of record testified at the hearing, they failed to deny under oath various sworn charges of petitioners (such as the charge that one of them had physically assaulted one of the individual petitioners (R. 44)). And they failed to explain the extraordinary denunciation of their clients contained in the resistance filed by the attorneys. Indeed, the attorneys called as their witness one who had moved for intervention in the main lawsuit and who had taken a position adverse to petitioners in the proposed complaint in intervention (R. 65-69). Testimony adverse to petitioners was elicited from this witness under leading questioning by the attorneys (R. 2).

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[5] The court of appeals denied the motion for want of jurisdiction (R. 77).

In the face of the overt demonstration by the attorneys of hostility to their clients, and the public accusations by the attorneys against petitioners of crimes involving moral turpitude (*e.g.*, fraud and perjury (R. 59)), the special master found that the attorneys had served petitioners "loyally, zealously and effectively" and "No cause exists for their discharge" (R. 72). While he granted leave to discharge the attorneys, he conditioned such permission upon payment to them of $200,000 in fees (R. 71), subject to reduction only in the event petitioners lacked means to pay the fees (*ibid*).

Petitioners had been accorded the privilege of being represented by counsel of their choice in connection with the removal proceedings (R. 54), which presumably included the right (at least as to the individual petitioners) to be represented *pro se*.[6] Nevertheless petitioners' subsequent pleadings seeking to secure review of the master's order (R. 86, 89) were ordered stricken on the ground that they were not signed by attorneys of record (R. 103, 106).

Throughout the remaining proceedings before the master and in the court below, the attorneys of record for petitioners continued to make statements adverse

[6] In a subsequent order (R. 108, 110) the master found that, apart from their local attorneys of record, petitioners also had available the services of "counsel of record who reside outside of the district." The Washington, D. C. firm of Haley, Doty & Schellenberg (later Haley, Doty & Wollenberg) had appeared as "of counsel" in the proceeding (R. 22), but no member of the firm entered an individual appearance, appeared before the district court or master, or on a pleading in the case, prior to the filing of the notice of appeal from the decision of the district court (R. 155). Rule 5 of the Rules of the District Court for the Southern District of Iowa requires that the individual names of all attorneys "in a cause" shall appear on the first pleading filed by them. Only the local attorneys involved in the removal proceedings were attorneys of record under the terms of this Rule.

to petitioners and failed to take actions essential to effective representation of petitioners.[7]

The Conduct of Petitioners Upon Which the Dismissals Were Predicated

1. The Refusals to Testify

At deposition proceedings subsequent to the order with respect to removal of attorneys, one individual petitioner (Strong) declined to testify further, and another individual petitioner (Gillmor) declined to testify, on the ground that they were unrepresented by counsel as a result of the orders precluding discharge of the attorneys of record except upon onerous conditions.[8]

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[7] *E. g.*, the attorneys of record failed to file any response to the initial motion of respondents to dismiss the complaint (R. 82-84). One of the attorneys threatened one of the petitioners on the record that he would soon be brought before a grand jury (R. 12). In exceptions to the master's report, the attorneys of record accused their clients of engaging in a "subterfuge" by which the court was to be "hood-winked" into dismissing the case (R. 136).

After the final decision of the district court dismissing the action, the attorneys of record filed an appeal purportedly "as attorneys of record for petitioners and in their own behalf as such attorneys of record" *First Iowa Hydro Electric Cooperative et al.* v. *Iowa-Illinois Gas & Electric Co. et al.* (C.A. 8, Case No. 15,549, decided May 24, 1957). In this appeal the attorneys purported to represent clients none of whom authorized the appeal (Slip Op. pp. 5-6, Case No. 15,549, *supra*), and continued to make statements adverse to some of the petitioners, such as: "Their conduct cannot be explained upon any reasonable or rational basis and we do not propose to try to excuse or defend their actions. As officers of this court, we feel that we would be less than fair with the court if we did not take this position." (Appellants' Br. in Case No. 15,549, p. 42).

[8] Thus Strong stated (R. 3-4):

> Mr. Master, I am Harry J. Strong, Plaintiff, the witness called in this deposition.
>
> I am here unrepresented by counsel.
>
> The Court has been on notice since September 2nd, that we have discharged our counsel.
>
> The Court has seen fit to freeze us in that position, and un-

2. The Failure to Pay the Deposit of $2500.00

As noted above, the order appointing Special Master Doerr required a deposit of $2500 each by petitioners and respondents (R. 50). This order was entered on September 21, 1955 as a time when petitioner's motion for leave to remove their attorneys was pending and undecided. Thereafter, petitioners continued to be represented on the record only by the attorneys in whom they had lost confidence, and who were publicly disparaging them,[9] until the final judgment of dismissal was entered in January 1956 (R. 154). The efforts of petitioners, acting *pro se*, to secure deferment of the deposit order on the ground that they were without counsel were unsuccessful (51, 53).

In addition to their lack of counsel, petitioners were faced with a bankruptcy proceeding (ultimately dismissed after a jury trial) in which certain alleged funds of the Cooperative had been turned over to a receiver (App. 17a). While this receivership was not instituted until October 12, 1955, some two weeks after the reaffirmation of the deposit order (September 27, 1955, R. 52), when it was instituted it obviously sus-

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der those circumstances, and without counsel, I am going to decline to testify further.

Similarly Gillmor stated (R. 11):

> I, being without [consel] of my own choosing, with this Court's action making it impossible for me to get counsel in whom I have trust and faith—with this Court trying to compel me to give testimony with counsel in whom I have lost confidence, faith and trust, and knowing we have discharged those who presume to represent me, I will stand on my Constitutional rights and ask that I be excused from testifying.

[9] Thus in the final proceedings before the district court on the motion to dismiss the complaint, one of the attorneys of record purporting (despite petitioners' objections) to represent them, informed the court that "I don't know of any justification or excuse for the failure and refusal of First Iowa Hydro Electric Cooperative to make the $2500.00 deposit" (R. 14).

pended petitioners' control over the Cooperative.[10] It appears from the report of the receiver in the bankruptcy proceeding (Case No. 1-177) in the district court that the receiver tendered the $2500 deposit to the district judge on October 13, 1955, and that such tender was rejected.

On the basis of the refusals to testify and failure to make the deposit order, respondents moved that the action be dismissed (R. 82-84). No written opposition to this motion was filed by petitioners' attorneys, and petitioners' resistance *pro se* (R. 89) was stricken (R. 103, 106). After giving petitioner Strong a final opportunity to testify, the master ordered dismissal of the action against the Cooperative and him (R. 115) and submitted a report to the court seeking approval thereof (R. 120). A subsequent order and report providing dismissal as to petitioner Gillmor were filed thereafter (R. 128, 131).

Oral argument on the master's reports and the motions to dismiss were held before the district court. In the course of the argument, one of petitioners' attorneys of record made a number of derogatory statements concerning petitioners, such as "I am unable to explain or to justify Mr. Strong's conduct on any reasonable or rational basis" (R. 13).

The district court found that "plaintiffs' claim that they are unrepresented by any attorney is without

[10] In a colloquy before the master on December 20, 1955 petitioner Strong stated as follows (R. 8-9):

> I say to you, we do not want this case dismissed because of our failure to pay into the Court the $2500. We do not have the $2500. What money as would be available, and I say to you if we had our funds today, I would pay the $2500 into the Clerk of Court, but under protest.
>
> Our funds in the amount of $5,081.81 were improperly ordered turned over to a receiver in an involuntary bankruptcy case in this same Court * * *.

merit" (R. 146), and that the failure of certain petitioners to testify and the failure to make the $2500 deposit were contumacious, willful and without justification (R. 148-150). The court ordered the action dismissed as to all the plaintiffs under the inherent power of the Court (R. 153); as to certain individual plaintiffs, the court also relied on Civil Rules 37 and 41 (*ibid*). This judgment was affirmed by the court below (App.).

REASONS FOR GRANTING THE WRIT

1. The decision of the court below sanctioned an improper general reference of an antitrust action to a special master. The decision is in conflict with the philosophy of the rule laid down by this Court in *La Buy* v. *Howes Leather Co.*, 353 U.S. 249, 1 L. ed. 2d 290, and to the extent the case is distinguishable from *La Buy*, it presents an important question which has not been, but should be, decided by this Court. See also *Los Angeles Brush Mfg. Co.* v. *Jones*, 272 U.S. 701; *McCullough* v. *Cosgrave*, 309 U.S. 634.

In the *La Buy* case, as here, a general reference was made, largely on the ground that the case was a complicated one which would require extensive time for disposition, and because of the congested state of the court calendar. In the *La Buy* case this Court held that the abuse of discretion involved was so serious as to warrant the issuance of an extraordinary writ by the court of appeals to prevent the reference to the master.[11]

[11] While this Court was sharply divided on the propriety of the use of the extraordinary writ (see separate opinion, 1 L. ed. 2d at 299) there appears to have been no dissent from the disapproval of the reference. No extraordinary writ is sought in the present case; the present petition seeks review of a judgment affirming a final dismissal of the action.

The opinion below seeks to distinguish the *La Buy* case on several grounds, none of which would justify a result different from the one there reached. The court implies that the issues in the *La Buy* case were not unduly complicated (App. 23a). An examination of this Court's opinion, however, reveals that the *La Buy* case was at least as burdensome to the trial court as has been the present case.[12] In any event, as is forcefully pointed out in the *La Buy* decision, "most litigation in the antitrust field is complex" (1 L. ed 2d at 299), but this is not a justification for abdication by the trial judge of his judicial responsibilities.

It is suggested by the court of appeals that petitioners waived any objections they may have had to the appointment of the master. This holding cannot be squared with the record which shows repeated objections on behalf of petitioners and repeated rulings by the master that participation before him would be without prejudice to challenges to the validity of the appointment (*supra*, pp. 6-7).[13] Moreover, the record establishes that petitioners also sought review by the court itself of the order appointing the master (*supra*, p. 7). Thus, if it be true that objections to appointment of a master technically should be addressed

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[12] The Court noted (1 L. ed. 2d at 295) that in one of the matters involved in *La Buy* "27 pages of the record are devoted to docket entries, reflecting that petitioner had conducted many hearings on preliminary pleas and motions." Indeed, if anything, in number of parties involved and complexity of pretrial matter, the *La Buy* case appears to have excelled the present one.

[13] The consent to appointment of a master by petitioners to which the court of appeals refers was a consent to the appointment of the prior master with limited powers. Petitioners never consented to the appointment of Master Doerr, nor to the plenary powers purported to be conferred upon him.

to the court itself, as the court below implies, it is clear that this requirement was met.[14]

It is also suggested by the court of appeals that the reference order was limited to pretrial matters. It is respectfully submitted that the language of the order of reference (App. 14a) cannot be so construed.[15] Moreover, the interpretive order of the district court, issued after the conclusion of most of the proceedings before the master (supra, p. 6), clearly did not undo the damage caused by the original order. For between the date of the original reference and the interpretive order, the master had in effect tried the petitioners for misconduct and issued an unqualified order of dismissal with respect to some of them (R. 115).

Even if it were concluded that the district court's original order of reference had been limited to pretrial matters, the order would nevertheless engraft an exception on the *La Buy* rule not warranted by this Court's decision in that case. Nothing in *La Buy* indicates that the Court intended to draw a distinction

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[14] The master ordered petitioners' pleadings in this regard stricken (*supra*, p. 9), but it seems evident that he could not lawfully bar access to the court to seek review of the very order appointing him. To arrogate such power to the master would be to hold in effect that he had authority to pass upon the validity of the reference order. If the pleadings filed by petitioners with the court were defective, it was incumbent upon the court itself so to rule, but in any event it cannot be inferred that petitioners affirmatively *waived* their objections.

[15] "• • • and that this entire cause be referred to him for such proceedings as may be necessary to hear the evidence, to take testimony on any issue herein, to pass on disputed claims, to pass on applications of the parties and to make where necessary special findings of fact and conclusions of law thereon and to report the same to the court, and these powers he shall exercise until otherwise limited by order of this court."

between delegation of judicial duties in pretrial proceedings and delegation of judicial duties at the trial proper. While the *La Buy* reference was made when trial was imminent, it was not suggested that the reference in that case would have been valid if made at an earlier stage. It is significant that in discussing ways in which courts could cope with the congested calendar problem, this Court did not intimate that burdensome pretrial proceedings be referred to masters. On the contrary, it suggested "the assignment of *judges* to handle only motions, pleas, and pretrial proceedings" (1 L. ed 2d at 299; emphasis added).

Pretrial proceedings, particularly in antitrust cases, are of increasing importance, and the manner in which they are supervised may determine whether litigation will be brought to an expeditious conclusion or will be interminably delayed until the poorer parties to the litigation are left without the ability to continue the litigation. The necessity for *judicial* supervision is as great in the pretrial stage of a case as at the final trial. In referring to the trial proper this Court said in *La Buy* (1 L. ed. 2d at 299):

> It does not follow that antitrust litigants are not entitled to a trial before the court. On the contrary, we believe that this is an impelling reason for trial before a regular, experienced trial judge rather than before a temporary substitute appointed on an ad hoc basis and ordinarily not experienced in judicial work.

This salutary principle is equally applicable to pretrial proceedings, and the decision below unduly seeks to limit the rule of the *La Buy* case to the precise facts upon which that case arose. It is important for the guidance of federal courts generally that this Court

authoritatively decide whether such limitation may be sanctioned. If the decision below stands unreversed, a fertile new field will have been created for reference to masters and undue delegation of judicial duties to them, and a grave injustice will have been done to petitioners.

2. If, as petitioner contends, the reference to the master of the entire case was improper, it seems clear that the deposit order (to secure payment of the master's fees and expenses) and the master's subsequent orders requiring petitioners to submit to depositions must fall with the unlawful reference order. But quite apart from the reference order, there is a further important ground for review by this Court.

The decision of the court below approves a shocking departure by the district court (and the special master appointed by that court) from the acceptable and usual course of judicial procedure calling for exercise of the supervisory power of this Court. The court of appeals has sanctioned a flagrant impairment of the fundamental right of counsel, as well as an abuse of discretion by the district court in dismissing the complaint in this case for conduct which was, at worst, an excusable consequence of erroneous orders of the special master.

By order of the special master petitioners were placed in the impossible position of paying onerous fees ($200,000) or being forced against their will to continue to be represented by attorneys who had become contemptuously indifferent to their clients' interests. The record is studded with statements and actions of the attorneys wholly inconsistent with a normal attorney-client relationship. It is no answer to suggest, as did the court below (App. 30a), that petitioners

relied upon unproved charges against their attorneys. For the attorneys' own conduct speaks for itself. They appear to have abandoned all semblance of professional decorum in their representation of petitioners. Thus, in one early pleading filed by them, it was stated (R. 57):

> We believe plaintiffs are committed to the philosophy that it is cheaper to attempt to discharge lawyers than to pay them money provided for that purpose by third parties interested in the success of the litigation, although such action is in breach of trust, in violation of their agreements and amounts to a fraudulent conversion of trust funds.

In the same pleading it was stated that petitioners were "seeking * * * to use this court and this lawsuit as an instrument for commission of a fraud" (R. 62). In one of the last pleadings filed with the district court, *a pleading in which they expressly purported to represent petitioners* (R. 134), the attorneys asserted that two of the petitioners "now seek a dismissal of the cause by indirection" as a "subterfuge" (R. 136). For other examples, see supra, pp. 7-8.

Although the numerous instances of overt hostility and disloyalty on the part of the attorneys were pressed on the court below both in brief and in oral argument, that court's lengthy opinion is silent concerning them. The court seems to have been of the view that the failure of petitioners to appear at the hearing scheduled by the master for consideration of the motion for leave to remove counsel destroyed any right they may have had to effective representation (App. 30a). We do not believe that the constitutional right of counsel may be so easily and inadvertently waived. Whatever fault

may be ascribed to petitioners for failure to appear at the hearing (at a time when they were seeking extraordinary relief from the court of appeals, *supra*, p. 8), it seems clear that they could not properly be compelled thereafter to accept representation by attorneys who made no effective effort to represent them, and who were overtly hostile.

The right to counsel is fundamental to a fair hearing. The layman is helpless without guidance in any complex legal proceeding. In *Powell* v. *Alabama*, this Court said (287 U. S. 45, 69):

> If in any case, *civil or criminal*, a state or federal court were arbitrarily to refuse to hear a party by counsel, employed by and appearing for him, it reasonably may not be doubted that such a refusal would be a denial of a hearing, and, therefore of due process in the constitutional sense. [Emphasis added.]

This Court has also recognized that effectiveness of counsel is unduly impaired where counsel are not devoted solely to the interests of their client. See *Glasser* v. *United States*, 315 U. S. 60, 70; *Von Moltke* v. *Gillies*, 332 U. S. 708, 725. It has also noted that mutual confidence is indispensable to the relationship. "The relations between counsel and client are of a very delicate and confidential character, and unless the utmost confidence prevails between them the client's interests must necessarily suffer" *In re Paschal*, 10 Wall. 483, 496.

Whatever right may exist in favor of an attorney to resist discharge by his client until he is paid for past services, it seems abundantly clear that such right

is conditioned upon a loyal and faithful discharge of his duties as an attorney so long as the employment relationship may exist. The conduct of these attorneys obviously failed to meet this standard. Yet the master made it impossible for petitioners to file pleadings with him or the court either to complain further of their attorneys' action or to seek relief from his orders (*supra,* p. 9). Under these circumstances it is both understandable and excusable that these lay petitioners, deprived of the opportunity to be represented by counsel in whom they had confidence, were unwilling to submit themselves further to deposition proceedings in which they would be examined by skilled counsel for respondents. It is understandable and excusable that they were reluctant to make the required deposit without advice of reliable counsel, particularly after the institution of the bankruptcy proceeding against the Cooperative (*supra,* p. 11). But even if it be concluded that petitioners were not entirely free from fault, the harshness of the final dismissal of the action with prejudice constituted a serious abuse of discretion.

CONCLUSION

The courts have a basic duty to protect the rights of parties before them, and to assure that the fundamental rights to a trial before the court and to effective counsel are not abridged. Both rights were abridged in this case. It is important to the administration of justice in the federal courts that the decision below be reviewed and reversed by this Court so that it will not stand as a precedent for wholesale references to mas-

ters, and unwarranted interference with the rights of parties to be represented by counsel of their choice.

Respectfully submitted,

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APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 15,548

FIRST IOWA HYDRO ELECTRIC COOPERATIVE, F. A. E. GILLMOR, HARRY J. STRONG, AND HARRY IMEL, *Appellants*,

v.

IOWA-ILLINOIS GAS AND ELECTRIC COMPANY, IOWA POWER AND LIGHT COMPANY, IOWA SOUTHERN UTILITIES COMPANY, INTERSTATE POWER COMPANY, UNION ELECTRIC POWER COMPANY, KANSAS CITY POWER AND LIGHT COMPANY, IOWA ELECTRIC LIGHT AND POWER COMPANY, NORTHWEST LIGHT AND POWER COMPANY, WISCONSIN POWER AND LIGHT COMPANY, IOWA PUBLIC SERVICE COMPANY AND IOWA UTILITIES ASSOCIATION, *Appellees*.

Appeal from the United States District Court for the Southern District of Iowa.

[May 24, 1957.]

J. Roger Wollenberg (Haley, Doty and Wollenberg were with him on the brief), for Appellants.

Learned A. Waterman (Charles D. Waterman, W. B. Waterman, James J. Lamb, Charles D. Waterman, Jr., Donald H. Sitz, Howard A. Steele, W. Z. Proctor, Harris N. Coggeshall, Llewellen E. Slade, Robert Valentine, Robert W. Greenleaf, R. W. Colflesh, Maxwell A. O'Brien, Clement F. Springer, Robert W. Berg-

strom, E. Marshall Thomas, Francis J. O'Connor, Robert H. Walker, W. Logan Huiskamp, Joseph A. Concannon, V. Craven Shuttleworth, Tyrrell M. Ingersoll, Harry E. Wilmarth, Byron L. Sifford, Byron Spencer, Joseph J. Kelly, Jr., Earl Smith, Frederic M. Miller, Joseph Brody, Val Schoenthal, and Sherwin J. Markman were with him on the brief), for Appellees.

Before WOODROUGH, VOGEL, and VAN OOSTERHOUT, Circuit Judges.

WOODROUGH, Circuit Judge.

This action was brought on February 18, 1954, to recover treble damages and injunctive relief under the Sherman Act and Clayton Act against the ten defendant utility corporations and the unincorporated association which are here as appellees.

After the action had been pending nearly two years and on January 25, 1956, the District Court sustained motions made by the defendants to dismiss it for failure of plaintiffs to prosecute and for disobedience to Court orders in violation of The Federal Rules of Civil Procedure. The Court dismissed the action at plaintiffs' costs[1] with directions that the dismissal should operate as an adjudication upon the merits. The grounds for dismissal were (1) that plaintiff Harry J. Strong as a party plaintiff and as an officer and manager of the corporate party plaintiff First Iowa Hydro Electric Cooperative and plaintiff F. A. E. Gillmor, president and director of said cooperative, each did willfully and without justification or excuse after having been ordered by the Court to testify by deposition, willfully and without justification or excuse refuse to do so; (2) and that the plaintiffs willfully and without justifica-

[1] Except as to the Master's fees and disbursements, which were divided.

tion or excuse failed and refused to comply with an order of the Court to make a deposit of $2500, to defray fees and disbursements of the Special Master.

This appeal is taken to reverse the judgment.

The defendants, except the unincorporated association and perhaps one or two others are, and long have been, engaged in distributing and selling electric power in an area that includes parts of Iowa and adjacent States. On September 8th, 1948, the Federal Power Commission granted a license to the plaintiff First Iowa Hydro Electric Cooperative to construct and operate a hydro-electric project, No. 1853, in the Cedar River which flows through Iowa and to generate and sell its electric power in the same area where appellees operate. In *State of Iowa* v. *Federal Power Commission*, 178 F.2d. 421, this Court dismissed a petition to vacate the Commission's order granting the license to First Iowa Hydro Electric Cooperative. Our opinion contains a brief outline of the project and our conclusions concerning the powers of the Commission in the matter as declared by the Supreme Court in *First Iowa Hydro Electric Cooperative* v. *Federal Power Commission*, 328 U. S. 152.

Although the probable cost of the project was estimated at many millions of dollars, the cooperative to which the license was granted consisted of the five persons who are joined with it as plaintiffs in this action. Each of the five has paid into the cooperative $2.00 for his share in it and the complaint alleged that "said individual plaintiffs constitute all of the members of the First Iowa Hydro Electric Cooperative and each own an equal one-fifth therein."

The complaint filed in this action charged that the defendants, beginning in 1938 when the cooperative was organized under the laws of Iowa (Chapter 390 § 1 of the 1935 Code of Iowa) and continuing thereafter, acted in conspiracy to violate and attempted to violate and violated the provisions against restraint of trade and monopoly con-

tained in the Sherman Act and in the Clayton Act, first, to prevent the issuance of the license for the project to plaintiffs and then to prevent financing the project and construction of it by plaintiffs and thereby did prevent the plaintiffs "from obtaining the necessary funds to construct said project." The period of time covered by the complaint was from 1938 to 1956. Plaintiffs alleged they had been damaged by the defendants' conduct in the sum of $40,000,000 and prayed for recovery in the sum of $120,000,000. They also prayed that defendants be enjoined from continuing their wrongful acts and in strict accordance with Rule 38 (b) of The Rules of Civil Procedure, they demanded a trial by jury "of all the issues tendered by the above and foregoing complaint, except the issue whether or not the plaintiffs are entitled to the equitable injunctive relief prayed for."

The allegations of wrong done by defendants against plaintiffs are set forth in the complaint, mostly in paragraph ten,[2] in general and sweeping terms and without identification of times, places, persons or utterances.

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[2] Paragraph 10. "That since the organization of the plaintiff First Iowa Hydro Electric Cooperative in 1938, the defendants conspired to monopolize, monopolized, and attempted to monopolize the generation, transmission, distribution, and sale of electric light and power, in the area above described, and have unlawfully contracted, combined, and conspired to restrain trade and commerce among the several states in the distribution of electric light and power. These unlawful conspiracies to monopolize, and contracts and combinations, and conspiracies to restrain interstate trade and commerce in electric light and power have been and are being consummated by the following means and methods, among others:

(a) Deliberate and continued attempts to prevent the issuance of a license to the plaintiff First Iowa Hydro Electric Cooperative and for the construction, operation and maintenance of the project originally known as the Cedar River Dam and later as Federal Power Commission Project #1853.

(b) The agreement during the year 1948 reciting in substance their unalterable opposition to the proposed hydro electric project on the Cedar River in Muscatine County, Iowa; their agreement to pool their resources to oppose the construction of said project; and their further agreement that in the event said project should

Likewise the allegations as to diligent efforts made by plaintiffs to obtain money to construct and carry out the project, No. 1853, and as to institutions which "would willingly have furnished the funds to pay the cost of said proposed project" are merely general.[3]

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be built said defendants would not use any power from said generation facilities.

(c) By threatening banks, bankers, financial institutions, their officers, brokers and or agents with boycott and loss of utility business on a national scale as well as the loss of future business from the members of the Iowa Utilities Association.

(d) Carrying said agreement and conspiracy into effect by applying various persuasions, influences, threats, and intimidations to banks and banking and financial institutions solicited, requested, approached, and contracted in behalf of plaintiffs to assist in financing said project and thereby forcing and coercing said financial institutions to refuse to assist in the marketing of any securities to finance the cost of constructing said proposed project.

(e) And otherwise hampering, interfering with, obstructing and impeding the financing of said project by divers and sundry means, methods and practices, the precise nature of which are unknown to these plaintiffs, but which proved nevertheless effective in thwarting and preventing the plaintiffs from obtaining the necessary funds to construct said project.

(f) By various other unfair competitive practices designed to appropriate all of the electric light and power distribution in areas in Iowa, Illinois, Wisconsin, and Missouri hereinbefore referred to, all of which were designed to prevent plaintiff and other possible competitors from engaging in the generation and distribution of electric light and power in the area last above referred to."

[3] The allegations are mostly in paragraphs and paragraphs number 12 and 15 of the complaint state:

Paragraph 12. "That plaintiffs have at all times since receiving their certificate to do business as an association made diligent effort to finance and construct said project, and they, together with various other individuals interested in the construction of said project and in the resulting generation, transmission, distribution and sale of electric light and power on reasonable terms in the territory adjacent thereto in the State of Iowa and adjoining states, began negotiations with various banks and financial institutions in New York City, Chicago, and elsewhere to arrange for the sale of bonds and other securities to pay for the cost of constructing said project."

Paragraph 15. "That but for the threats, intimidation, coercion and other activities of defendants hereinbefore described the financial institutions above referred to would have willingly furnished the funds to pay the cost of said proposed project."

Shortly after the complaint was filed and before any of the defendants answered it, certain defendants began discovery proceedings by means of written interrogatories and notices of depositions of the plaintiffs, but the interrogatories propounded and the answers and the notices gave rise to objections and motions and on March 30th, 1954, thirty days after the complaint had been filed, Judge Riley, on whose docket the case pended, conducted proceedings relative to preparing the case for trial at which all parties were represented by attorneys of record. Judge Riley observed that the charges in the complaint were very general; that under the old rules there would have been a plethora of motions for more specific statements and to strike and everything else; that little time should be wasted on those methods because of discovery proceedings designed to obviate them. Judge Riley stressed the seriousness of the charges in the complaint and their generality and declared that the defendants had the right to find out through depositions of the plaintiffs what the plaintiffs claimed the facts were on which they based their accusations and claims. The Judge accordingly made suggestions that all counsel sit down and try to figure out and agree among other things upon how the taking of the depositions of the individual plaintiffs should be handled in an orderly way and made suggestions how it could be done without undue duplication but in fairness to each of the eleven defendants.

He did not however require the defendants to file answers to the complaint before carrying on their discovery proceedings.

Apparently he thought that the defendants could obtain the information, to which they were entitled, from the individual plaintiffs by the production of documents and by depositions of plaintiffs. He directed the defendants to proceed to obtain the production of the documents by the plaintiffs and the taking of depositions of the individual plaintiffs in accordance with Rule 20.

It resulted that on July 9, 1954, the Court was called on to consider motions on behalf of both plaintiffs and defendants with respect to interrogatories which had been propounded and the responses prior to any pleading filed by defendants or the cause being at issue. After consideration of that situation, the Judge concluded that it was necessary to have the issues joined before proceeding further with the discovery proceedings and directed that defendants plead to the complaint within twenty days. At the same hearing he also entered an order to compel plaintiff Harry J. Strong to make and file a written oath to the effect, i.a., that he is secretary treasurer of the plaintiffs' cooperative, that the answers to interrogatories to which his signature was attached were made by him in that capacity as such officer for and on behalf of plaintiff [cooperative] and that his answers were true, etc., and that "failing this, plaintiff will be subject to sanctions under Rule 37."

A separate answer for each defendant was accordingly filed in due time, the answers being similar in respect to general and particular denials of all charges and each set up a number of specific defenses. But the generality of the pleadings left the defendants under the same necessity as before to find out through depositions of the plaintiffs what the plaintiffs claimed the facts were on which they based their charges and the court declared that its rulings on certain motions that had been filed were without prejudice to defendants' right to obtain by deposition the information they had sought by interrogatories.

Following the proceedings before Judge Riley on July 9, 1954, defendants were unable to compel the production of documents or the taking of depositions of the individual plaintiffs throughout the rest of the year 1954. Plaintiffs did not commence the production of the documents called for until January 18, 1955, and additional production was compelled by order of Judge Riley on March 24, 1955. The

taking of the depositions of the individual plaintiffs which Judge Riley had declared to be the right of the defendants in his order of July 9, 1954, was delayed longer. Efforts to enter upon the taking of depositions by agreement failed and it was not until the 16th of May, 1955, about fifteen months after commencement of the action, that motions of certain defendants were sustained to the extent that the Court ordered that one of the defendants (Union Electric Power Company) should proceed to take the deposition of plaintiff Harry J. Strong on the sixth day of June, 1955, and named Commissioners to take the testimony and specified the place and hour. The Court directed the plaintiff Strong to present himself as the first witness and subject himself to examination as a witness until his deposition was concluded.

Afterwards on May 23, 1955, an order was entered by the Court which recited that it appeared from the record and from the statements of counsel that it would expedite the taking of depositions and be in the interest of justice to appoint a Special Master in connection therewith. Mr. Wayne G. Cook was appointed as Special Master to supervise the conduct of the taking of said depositions, to rule on objections and to rule on all applications for relief which may be made by any party. He was to have "such other powers as the Court may by order later prescribe" and the order appointing him provided that his compensation was to be paid by the defendants participating in the depositions.

The order for the appointment of Mr. Cook was made with the consent of all parties but before the taking of depositions began under it, plaintiffs moved to have the expense of plaintiffs' attorneys incidental to their attendance at the depositions assessed upon the defendants.

The motion was denied on June 4th, 1955.

The deposition of Strong was accordingly begun pursuant to the Court's order on June 6, 1955, before the ap-

pointed Master and was carried on with some intermissions for fifteen days and until June 24, 1955.

Strong's testimony showed that he had originally conceived the idea of the formation of the plaintiff cooperative. He had been its general manager since its formation, was its secretary-treasurer and handled its funds, kept the records and devoted his time to its affairs since 1938. The allegations and charges of the complaint were based largely on the information he furnished to the attorneys and all of the other individual plaintiffs who testified corroborated that Strong was at all times the guiding force of the cooperative. He could apparently have disclosed what basis he had for each of the charges made against defendants of wrong doing in paragraph 10 of the complaint, but he reiterated day after day of his examination in response to inquiries as to whether he had disclosed all the facts on which he relied in respect to such allegations in substance, "I am sure that there are more * * * I can't recall them."

On the last few days of his examination, commencing on June 21, 1955, counsel began inquiring about the financial affairs of the cooperative. As the cooperative had no capital and proposed to obtain the millions necessary to pay for promotion expense, construction cost and commencement of operations from borrowing through the sale of bonds to be issued by it, the inquiry as to the handling of its financial affairs was relevant to the issue as to what caused the cooperative to fail, as to what transactions it had engaged in and as to damages.

Strong testified that the cooperative had never had a bank account in its own name and its funds were carried into his personal bank account; that he had "no way of knowing" how much of the $133,029.59, reflected in a certain report of the cooperative of August 9, 1952, to January 1, 1954, had gone through his personal account. He was asked how he accounted for a difference between the amount of money collected for the cooperative and the

amount he showed had been spent and he replied, "I have no answer for it." He stated that he would not produce his personal records for defendants to hash over and stated; "It is none of your business."

On June 22, 1955, Strong's attorney objected to further questioning of Strong regarding the finances of the cooperative, but counsel for the defendant taking the deposition, moved that the Master require Strong to produce his bank records because the personal and cooperative funds were shown to be commingled in those records. On examining the transcript and hearing the arguments, the Master ordered the production of the bank records. Thereupon the plaintiffs made charges against the Master, Mr. Cook, to the effect that he was disqualified to act as Master and they obtained a delay of the deposition until July 11, 1955, in consequence of the charges.

Strong was advised by the counsel examining him for the defendants that on resumption of his deposition there would be further questioning concerning the finances of the project.

The parties convened before the Master on July 11, but there was no examination of Strong until the morning of July 12th, when he submitted to questioning on matters other than finances. With exception of the questioning on that morning, Strong practically terminated the taking of his deposition on June 22, 1955, at the time when the Master heard the motion for production of his bank records and ruled that they should be produced. Strong prevented defendant Union Electric Company from completing its examination of him and none of the other defendants ever had an opportunity to examine him.

A number of continuances of his deposition applied for and granted at the instance of the plaintiffs or their attorneys contributed to the delay but final action of the Court dismissing the action followed upon the absolute refusal of Strong to testify on October 20, 1955, his further

refusal on November 18th, 1955, and again on December 20th, 1955; and upon the absolute refusal to testify by plaintiff Gillmor on January 10th, 1956.

As to Strong's refusal on October 10th, the record shows that at 11:00 o'clock on that day he came into the hearing room before the Master and all counsel pursuant to the order of the Court and notice duly given him and announced that he would not testify. The Master urged him "for his own good" to testify but he walked out of the room. Strong appeared again before the Master and all counsel on November 18th pursuant to the orders of the Court and of the Master and notice given him and when the question was raised whether he still refused to testify he departed from the hearing room. Again on December 20th, Strong appeared before the Master and attorneys pursuant to order and notice and asked to be excused from testifying. The Master declined to excuse him and admonished him that the consequence of his refusal to testify would be the entry of an order of dismissal. Strong said he would chance the dismissal and persisted in his refusal to testify.

The plaintiff F. A. E. Gillmor was the President of the Cooperative and the order of the Court for the taking of his deposition contemplated that it should follow after the completion of Strong's deposition. After that deposition was finally broken off by Strong's refusal to continue to testify and on December 22nd, 1955, the Master ordered Gillmor's deposition to commence on January 10th, 1956, and on that date Gillmor appeared before the Master and the attorneys of record for the parties. On being called on to take the oath he read a prepared statement and asked to be excused from testifying. The Master denied the request and Gillmor stated that he refused to testify and left the hearing room.

Thereafter the depositions of the three other individual plaintiffs were taken before the Master. They were gen-

erally to the effect that Strong was the one who devoted all of his time to the affairs of the cooperative. He had organized it and was the moving force and negotiated and took care of its business affairs, its records and its finances and "by and large was the man running the show." He made reports to the others and they had confidence in him and relied on him to carry on.

The Special Master duly reported to the Court the action of Strong and of Gillmor in refusing to testify. He also sustained motions made by defendants to dismiss the action because of the refusal but the Court treated that action of the Master as merely a recommendation and the judgment of dismissal here appealed from is based on the findings and conclusions made by the Court.

As to the refusal of plaintiffs to make deposit for Master's fees, Judge Riley evidently thought the pre-trial proceedings which were manifestly necessary to define the issues and get the case ready for the jury trial which had been demanded would be speedily accomplished through the cooperation of the attorneys. He at first merely appointed persons to act as amanuenses in the taking of depositions of individual plaintiffs, but after the lapse of nearly fourteen months without a single deposition having been taken, he appointed Mr. Cook Special Master with powers to supervise the conduct of the taking of depositions of the five individual party plaintiffs "including the length thereof," as above stated, and both sides invoked the powers of the Master in the course of the taking of Strong's deposition before him. After Mr. Cook ruled that Strong's bank records should be produced the plaintiffs made complaint against him before Judge Riley and although the Court, after hearing, found there was no cause for Cook's removal as Master, his resignation was accepted on September 21, 1955, and Mr. Edward A. Doerr was appointed Special Master in his place.

The original order appointing Mr. Cook as Master provided that the Master should have "such other

powers as the Court may by order prescribe" and in the order appointing his successor, Mr. Doerr, the powers were broadened to include "all powers authorized by Rule 53 of The Federal Rules of Civil Procedure" and "these powers he shall exercise until otherwise limited by order of this Court."

In his order appointing Mr. Doerr as Master, Judge Riley recited that extended discovery proceedings had been in progress and that they awaited resumption pursuant to order of Court and that there were controversies between plaintiffs and their counsel awaiting solution as to which Strong had requested disposition as soon as possible; that depositions were pending to preserve testimony and that the variety and number of the problems presented, the complicated nature of the issues involved, the best interests of all persons and parties affected and the interests of justice demand that "these proceedings" (evidently meaning the discovery proceedings) may be carried forward to their conclusion with the utmost dispatch.

The order appointing Mr. Doerr (the second Master) and prescribing his duties and powers conferred no powers in respect to the jury trial that had been duly demanded by the plaintiffs by endorsement on their complaint under Rule 38b and Judge Riley later declared that "the appointment of the Special Master does not and cannot deprive plaintiffs of their right to a jury trial, nor does it empower the Special Master ultimately to hear and determine the issues between the parties upon a trial of this cause." Mr. Doerr was never called on to perform any function in the case beyond discovery proceedings and in the matter of the attorney controversy, all preliminary to and in preparation for the jury trial on the merits.[5]

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[5] The order appointing Mr. Doerr contained the following recitals:

"There are eleven named defendants, ten of whom are alleged to be private corporations engaged in the business of

Coincident with its order appointing Mr. Doerr, on September 21, 1955, the Court ordered "the deposit forthwith into the registry of this court the sum of $2500.00 by plain-

producing, selling and distributing electrical power in Iowa, and the eleventh to be an unincorporated voluntary association, including ten named defendants among its members.

The issues are complicated beyond those normally to be found in the usual action. There are extended discovery proceedings in progress since June 6, 1955, and now awaiting resumption on October 3, 1955, pursuant to order of Court. Controversies have arisen between plaintiffs and their counsel since August 29, 1955, which await solution, in respect of which plaintiff Harry J. Strong, has requested disposition as soon as possible; depositions are pending to preserve testimony and other factors urge the action herein ordered to be taken."

"The present engagements of the court to which commitment had been made long prior to this date require continuous absence of the judge from this division for regular terms of the court, commencing on Sept. 26, 1955, in the Southern Division, Oct. 3, 1955, in the Western Division, Oct. 17, 1955, in the Ottumwa Division, Oct. 24, 1955, in the Central Division, and Nov. 28, 1955, in the Eastern Division of this District.

"The variety and number of the problems presented in this action, their complicated nature, the issues involved, the best interests of justice combine to demand that these proceedings may be carried forward to their conclusion with the utmost dispatch. The court recognizes that the expense consequent to the appointment of a master with general powers should make it the exception rather than the rule and has weighed the cost incident thereto against the benefits to be derived by all concerned, it is firmly persuaded that the circumstances described and involved and the peculiar urgency of the many and complex problems require departure from the rule of avoiding the appointment of special masters where possible."

"Accordingly, the court must find it to be advisable and necessary in the premises that a reference shall be made to a special master who shall have and exercise all powers permitted to masters under Rule 53 of the Federal Rules of Civil Procedure and such additional specified powers as later may be conferred upon and delegated to him in that capacity."

"• • • and that this entire cause be referred to him for such proceedings as may be necessary, to hear the evidence, to take testimony on any issue herein, to pass on disputed claims, to pass on applications of the parties and to make where necessary special findings of fact and conclusions of law thereon and to report the same to the court, and these powers he shall exercise until otherwise limited by order of this court."

tiffs and the sum of $2500.00 by defendants, to defray the fees and disbursements of the Special Master'"[6] and on September 26, 1955, the plaintiffs moved the Court to "defer the requirements of the depositing of the sum of $2500.00 as ordered by this Court under its order dated September 21, 1955." The Court gave full consideration to the motion and denied it and thereupon ordered the plaintiffs to make the deposit of $2500.00 forthwith as a condition of going forward with their action.[7] Although the plaintiffs were fully able to comply with the order, they refused to make the deposit.

There was no question in the trial court and there is none here that when Strong refused to continue his deposition and when Gillmor refused to testify and when all the plaintiffs refused to make the deposit for costs ordered by the Court, each and all of them acted deliberately with full understanding that their refusals were in violation of the orders of the Court. They asserted a right to disobey the court as they did on the ground that they had lost confidence in their attorneys about the first of August, 1955. Their claim was that from that time on they were without the assistance of counsel of their own choosing.

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[6] "It is further ordered, that the fees and disbursements of the master shall be allowed by the court from time to time and that for the purpose of assuring the payment of his fees and disbursements as related to the services of the special master except as directed by Paragraph IV of the order of May 23, 1955, (defendants' discovery depositions were to be charged to defendants) there shall be forthwith paid into the registry of this court, $2500.00 by the plaintiffs and $2500.00 by the defendants, which sum shall be paid out to the Special Master upon the order of the court for the allowance of fees and disbursements, and that said sum shall be subject to increase from time to time as the necessities of the situation may require."

[7] The order required the deposit for costs by plaintiffs because the plaintiffs were the moving parties in making charges against their attorneys of record and asking for speedy hearing of their evidence to support their charges. The costs of the master as to all discovery depositions taken by defendants remained chargeable to defendants only.

They first called Judge Riley's attention to a quarrel between themselves and their local attorneys by a so-called petition to intervene presented by four of the individual plaintiffs on September 2, 1955, in which they made charges against their attorneys and alleged that they had obtained an agreement from other attorneys of record and that the attorneys of record had agreed but had later declined and had moved to quash the entry of appearance made by Bell, Farrar and Scott.

When the motion of the local attorneys of record to quash the appearance of Bell, Farrar and Scott was brought up for hearing, Bell, Farrar and Scott withdrew their appearance for plaintiffs and the Court accepted the withdrawal. The Court therefore found that the proceeding to quash the attorneys' appearance had become moot, leaves nothing before the Court for hearing and that a so-called petition of the individual plaintiffs in the case to intervene in the moot proceedings if regarded as filed, should be, and was stricken.

Accordingly all of the plaintiffs joined ten days later, on September 16, 1955, in filing a motion "by Harry J. Strong, Secretary-Treasurer," for leave to remove their attorneys of record as attorneys for plaintiff herein. The motion set forth numerous and serious charges made by the plaintiffs against their local attorneys of record and prayed leave to dismiss them.

The pendency of this motion was an important factor in Judge Riley's decision to appoint Mr. Doerr as Special Master some five days after the motion had been filed. In the order relieving Mr. Cook as Master, the Court stated in reference to this motion: "• • • and matters having recently arisen which make it desirable and in fact necessary, in the opinion of the Court, to immediately appoint a Master with broader powers." It was contemplated that the attorney dispute would be promptly presented to, passed upon and reported by Mr. Doerr. The defendants

had nothing to do with the quarrel between plaintiffs and their attorneys of record, but the existence of that quarrel was a cause of delay and continued pendency in Court of the claim for $120,000,000 against the defendants, after the claim had already been held in Court for a year and a half. Judge Riley did not evince unwillingness to try the attorney controversy himself, but specified official obligations that would delay his doing so. Upon the appointment of Mr. Doerr as Master with full power to hear and report on the attorney controversy, Strong wrote to Doerr, as Special Master, explaining that the matter of removing plaintiff's attorneys of record had been assigned to him (Doerr) and requesting that an early hearing be had on the matter. Strong also requested in the letter that postponement of discovery proceedings be granted to enable new counsel to become informed and to prepare and proceed in the case.

Accordingly, Mr. Doerr as Master, within a few days after receiving the letter from Strong, entered an order setting the plaintiffs' motion to remove attorneys and any response to it for hearing before him on October 3rd, 1955, and directed that plaintiffs be represented on the hearings by counsel of their own choosing.

The attorneys of record for plaintiff filed a motion in resistance to the motion of plaintiffs to remove them as their attorneys and also sought affirmatively to compel plaintiffs to turn over to them some ten thousand dollars on account. Other parties who had advanced money to plaintiffs sought to intervene in the proceedings for removal of attorneys and to impress a trust upon the money advanced. These parties were denied relief and do not appeal.

Creditors also brought involuntary bankruptcy proceedings against the plaintiff cooperative which were heard before Judge Riley and a jury. In the course of the proceedings a receiver was appointed for the cooperative and Strong was ordered to turn the assets over to the receiver.

The date of the turn over order was some months after the plaintiff had been ordered to make the deposit for costs and had made their refusal to comply.

On October 3, 1955, the day appointed for the hearing of the attorney controversy before the Master, the plaintiffs wilfully absented themselves from the hearing and on their failure to appear in person or by attorney, the Master adjudged them in default. The attorneys of record accordingly introduced their evidence and the Master found upon the evidence that there was no cause for discharging the attorneys; that they had faithfully and loyally performed their services for plaintiffs which were of great value, to wit: $200,000; that the attorneys recognized their continuing obligation to serve the plaintiffs and that there was no reason in plaintiffs' relationship with their attorneys for postponement of proceedings in the cause. The Master held that the plaintiffs had the right to discharge the attorneys but only on the condition of the payment of the fees and disbursements of the attorneys to the extent of the means possessed by plaintiffs and that it was left open to plaintiffs in spite of their default to show inability to comply with the conditions imposed. The conclusions of the Master were declared orally on October 3rd, and his opinion and order in writing were issued October 5th, 1955.

On the day of the hearing before the Master (October 3rd, 1955), Strong was in St. Paul, Minnesota, and there applied unsuccessfully to this Court in person for himself and the other plaintiffs for leave to file a petition for mandamus and injunction and for an order staying proceedings in this case.

A few days later, on October 10th, 1955, he filed an affidavit of bias and prejudice against Judge Riley in the District Court alleging that Judge Riley had a personal bias and prejudice against "our project, a hydro electric development on the Cedar River," and among other things that Judge Riley has issued orders in the case that were

biased and prejudiced; that the Special Master (Doerr), appointed by Judge Riley, had in turn issued orders which carry out the bias and prejudice and that the biased and prejudiced orders were merely a furtherance of defendants' strategy to completely break the plaintiffs so they could not pursue their cause of action. He also alleged that unless Judge Riley was removed as judge in the matter and all orders entered therein since September 2, 1955, were stricken, he and his associates would be denied a fair trial. He also stated in a "certificate" signed by him accompanying the affidavit of prejudice that it was filed because he felt it was the only means to hasten the trial of the cause.

On October 14, 1955, Judge Riley ordered a hearing on the affidavit on October 21st, 1955, and on that date having inquired into the timeliness and sufficiency of the affidavit of bias and prejudice he adjudged that it was not timely filed and was insufficient to meet the requirements of 28 U.S. Code, since the bias was charged "against our project" and not against the plaintiffs or either of them and furthermore the affidavit was not accompanied, as required by the statute, by a certificate of counsel.

It is undisputed that Judge Riley's ruling was in accord with the statute and the proceedings in the case were properly continued "as though the affidavit had not been filed."

On January 20th, 1956, Judge Riley proceeded, after notice and with the consent of all parties, to hearing of the several motions made by defendants to dismiss the case for infractions of the Rules and failure to prosecute, the objections of plaintiffs to the reports of the Master Doerr, a motion by plaintiffs, filed on January 19, 1956, to vacate the order appointing Doerr as Master and to set aside all of his acts thereunder, and a motion by defendants to strike said motion to vacate, and on January 25, 1956, after a hearing, the Court filed its memorandum of

decision upon all motions and objections then pending and its order for judgment. It set forth step by step all of the motions, hearings and rulings that had been had in the case and found no error prejudicial to the plaintiffs and no controversy undetermined as to any facts in issue. The Court found the plaintiffs to be represented by their local attorneys of record and that the firm of attorneys appearing for them on this appeal, also appeared of counsel. It was further found:

"The complaint seeks recovery of $120,000,000 in treble damages and equitable relief under the anti-trust laws. The period of time covered by the complaint extends from 1938 to 1954. There are ten defendants, whose separate answers pose evidentiary and procedural problems of great magnitude. The issues in this action involve engineering, financing, economic and other technical problems of vast complexity. The discovery proceedings, still in their early stages, have resulted in volumes of testimony and documents. The record discloses many difficult problems pertaining to marketability of power, project design, economic and engineering feasibility, financing methods and expectations, costs of construction and power, additional and numerous expert witnesses, and other discovery proceedings requiring continued supervision to prevent oppression or hardship to any party. The documents which plaintiff have voluntarily produced in response to defendants' interrogatories and which plaintiffs have produced under order of court and order of the Master are detailed and voluminous. For example, the transcripts of the Federal Power Commission hearings exceed 5,000 pages."

"I find that the issues are complicated and that the reference was not only proper but necessary in the interest of justice. This action, peculiarly and ap-

propriately, requires the appointment of a Special Master."

The court said as to the refusals of Strong and Gillmor to testify:

"The deposition of Harry J. Strong was begun under an order of this Court, and its resumption was ordered both by this Court and by the Special Master. On September 28, 1955, the Special Master, upon the informal request of the witness, postponed the resumption date to October 10, 1955. On October 19, 1955, Harry J. Strong expressly refused to testify, although instructed twice by the Special Master to testify. The witness left the hearing room while one of the defendants was attempting to advise him that sanctions would be sought under Rule 37(d), should he persist in his refusal to testify. Despite such conduct, the Special Master gave the witness a final chance to testify and ordered his deposition to resume on December 6, 1955. In his order, which was entered on November 21, 1955, the Special Master found that the witness' refusal to testify was flagrant, wilful and without justification or excuse and had the necessary effect of disrupting orderly procedure and hampering defendants in making their defense. The witness was, and is, secretary, treasurer, director and general manager of plaintiff First Iowa Hydro-Electric Cooperative. The order provided that, if the witness again refused to testify, the action would be dismissed as to plaintiff Harry J. Strong and First Iowa Hydro Electric Cooperative. The order was served on all of the named plaintiffs and on their attorneys of record. At the request of plaintiffs through their attorneys of record, the resumption date was postponed until December 20, 1955. On December 20, 1955, the witness was again present and again expressly refused to tes-

tify. He stated that he would take his chances on a dismissal of the action."

"I find that plaintiff, Harry J. Strong, was secretary, treasurer, director and managing agent of plaintiff First Iowa Hydro Electric Cooperative. I find that the refusal of the witness to testify was flagrant, wilful, and without justification or excuse and had the necessary effect of disrupting orderly procedure and was prejudicial to the defendants in making their defense. I find that, under the circumstances, there was no necessity for according this witness another chance to testify. As with Strong, the conduct of the Witness Gillmor was contumacious, his attitude defiant; his reasons for refusing to testify invalid. The (disrespect) which these parties exhibited toward judicial process is the proper subject of sanctions sought by defendants."

The final judgment of dismissal of the action provided that the dismissal should operate as an adjudication of the merits.

On this appeal taken to reverse the judgment of dismissal of the case with prejudice, the appellants are represented by the firm of Washington attorneys which appeared of record, as of counsel, on the complaint in the action.[8]

The points argued for reversal of the judgment are to the effect (1) that the reference to Special Master Doerr was unlawful and all orders issued in connection therewith and all acts under it were void; (2) that it was arbitrary and unlawful to dismiss the action for failure of plaintiffs to make the $2500. deposit and for failure of Strong and of Gillmor to testify; (3) and that plaintiffs

[8] Mr. Wollenberg has in the meantime succeeded Mr. Schellenberg as a member of the firm.

were erroneously denied the right to be represented by counsel of their choice.

1. As to the reference to Master Doerr.

In their attack upon the District Court's appointment of Doerr as Master with "all powers authorized by Rule 53 of the Federal Rules of Civil Procedure" the appellants have relied mainly upon *Howes Leather Company* v. *LaBuy*, 226 F.2d 703, 7 Cir., affirmed as *LaBuy* v. *Howes Leather Company*, 353 U. S. 249.

That action, like the one at bar, was for the recovery of treble damages and equitable relief by reason of defendants' alleged violations and threats to violate the anti-trust laws. After long preparation, the case came on for trial and thereupon the District Court, instead of entering upon the trial, referred the case to a Master for trial over the objections of all parties. The Master ruled that the cause would proceed to trial before him and it was at that stage of the case that defendants petitioned the Court of Appeals for the 7th Circuit for a writ of mandamus to compel the District Judge to vacate the order of reference of the trial to the Master and direct the trial of the cause to proceed before the court. Judgment awarding the writ was granted by the Court of Appeals and the Supreme Court affirmed. The Supreme Court held that the Court of Appeals was justified in finding that the order of reference for trial of the case was an abuse of the power of the District Judge under Rule 53(b) amounting to little less than an abdication of the judicial function and depriving the parties of trial before the court on the basic issues involved in the litigation. When the reference was made there were no such complicated issues present as required by Rule 53 to justify the reference to a Master.

The case at bar presents an entirely different situation. Instead of this case being ready for trial or being turned over to a Master for trial on its merits, on basic issues

between the partes, the case was "in an early stage" of preparation for trial when the Court made the reference to Mr. Doerr as Master.

At the time of the appointment on September 21st, 1955, more than a year and a half had elapsed since the action was brought and the pretrial proceedings for discovery were as found by the trial court, "still in their early stages."

The complications of the issues and exceptional circumstances blocking the preparation for trial on the merits of the case were arising in those proceedings and as declared by Judge Riley, it was his purpose in making the appointment to provide for supervision of discovery proceedings and to "prevent oppression or hardship to any party."

Simply stated, the plaintiffs through their pleading were claiming in general terms that Project No. 1853 was a sound project and that they had been entitled to receive and would have promptly received their federal license therefor and would have obtained the money to promote, construct and operate the project, save that defendants' wrongs prevented. We think the Court did not distort or exaggerate the complications of the issues to be anticipated in the discovery proceedings carried on to find out the facts, or claimed facts, on which plaintiffs were basing such a cause of action or in the trial thereof. There is no contention that Judge Riley erred in declaring the right of defendants to attempt such discovery and we find no error in his conclusion that the issues involved in it were complicated and the case was exceptional in presenting occasion and necessity for the services of a Master preliminary to trial such as seldom arises in litigation. There was obvious possibility of oppression and hardship unless the discovery proceedings were continuously supervised and kept in order through the services of a Master. The Court took pains to prevent any financial burden on plaintiffs except in respect to the matter of the discharge of their

attorneys wherein they were the moving parties requesting action and the issues between them and the defendants were not involved.

They had no right to hold their $120,000,000 claim against defendants in court unless they were able to prosecute their case. Through no fault of defendants, their quarrel with their attorneys was disabling them from prosecuting their suit. The appointment of the Master Doerr was made in part to expedite settlement on that matter and they acted reasonably and with good sense when they acquiesced in the appointment of Master Doerr and wrote to him for a speedy hearing of their quarrel with their attorneys.

It is true that in the order appointing Doerr after conferring upon him the powers authorized by Rule 53, the order reads "that this entire cause be referred to him for such proceedings as may be necessary, to hear evidence, to take testimony on any issue herein, to pass on disputed claims, to pass on applications of the parties and to make where necessary special findings of fact and conclusions of law thereon and to report the same to the Court, and these powers he shall exercise until otherwise limited by order of this Court."

Appellants have argued that by this wording the Court committed the trial of the case to the Master Doerr, but the order should not be so construed. The order was made "in the early stages" of discovery proceedings, the proceedings were expected to be extended and the difficulties to be met by the order were the exceptional complications in those proceedings.

Likewise the final clause directing the powers to be exercised "until otherwise limited by order of this Court," reflects that Judge Riley had only the Master's services preliminary to trial in mind as he declared in his order of January 9th, 1956.

Quite aside from any possible ambiguity in the order in respect to powers of the master that might have been asserted after the pretrial proceedings, the record shows that Doerr was never called on to exercise any such powers. All he had to do with what is here involved was the taking of discovery depositions and hearing the controversy over the discharge of attorneys.

The appointment of a Master to take depositions of plaintiff was agreed to by all parties and Strong gave his testimony before the Master without any objection until the Master ordered the production of the bank records.

If there had ever been any ground for the plaintiffs to question the delegation by the Court of the taking of the discovery depositions, it had been fully and completely waived by the plaintiffs long before the plaintiffs committed the acts of disobedience that caused the dismissal.

We think the ruling of the Supreme Court against referring the final trial of the case to a Master in the *LaBuy* case has no application to the order of the Court appointing Doerr as Master for the complicated and exceptional issues in the preliminary stages of this case.

The ruling of the Court appointing a Master is fully supported. *Smith* v. *Brown*, 5 Cir., 2 F.2d 926; *Coyner* v. *United States*, 7 Cir., 103 F.2d 629; *Graffis* v. *Woodward*, 7 Cir., 96 F.2d 329; *Hart* v. *Williams*, App.D.C., 202 F.2d 190; *Tendler* v. *Jaffee*, App.D.C., 203 F.2d 14, cert. denied, 346 U.S. 817. As this court recently stated: "Beyond the provisions of Rule 53, Federal Rules of Civil Procedure, 28 U.S.C.A., for appointing and making references to Masters, a Federal District Court has 'the inherent power to supply itself with this instrument for the administration of justice when deemed by it essential.' *Ex Parte Peterson*, 253 U.S. 300, 312, 40 S.Ct. 543, 547, 64 L.Ed. 919; *Westchester Fire Ins. Co.* v. *Bringle*, 6 Cir., 82 F.2d 262, 263. While reference should be the exception and

not the rule in judicial administration, the Court may, in its discretion, make appointment of a Master to assist in any of the incidents of a proceeding before it, whether civil or criminal, so long as there is no infringement upon the right of trial by jury or any prejudice to other substantive right." *Schwimmer* v. *United States*, 8 Cir., 232 F.2d 855, 865.

Although the plaintiffs entered objections to the appointment of Master Doerr when they appeared before him on certain occasions, they did not present such an objection to Judge Riley until January 19th, 1956.[9] Long before they filed the motion shown in the footnote, the master had held numerous hearings and entered numerous orders and plaintiffs had frequently invoked his jurisdiction.

We emphasize again that the proceedings before the Special Master had not reached the trial stage. The court in its order of January 9, 1956, clearly indicated it was not its intention that the case should be heard upon its merits before the Special Master, stating [Appellees' Supplemental Record, p. 125]:

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[9] Their motion filed on January 19, 1956, reads:

"Come now the plaintiffs and their attorneys of record, in behalf of plaintiffs and in behalf of their attorneys of record, and move the court to make an order vacating and setting aside the order made by this Court on Sept. 21, 1955, appointing Edward A. Doerr Special Master in this cause, or each and all of the reasons set forth in the petitions for review of the orders of the Special Master which were filed in this cause with respect to the orders made by the Special Master on Dec. 22, 1955, and Jan. 16, 1956, and the grounds stated in the objections and exceptions to the report of the Special Master which was filed January 4, 1956, and to the supplemental report which was filed Jan. 17, 1956, and the objections urged and interposed orally in the record by these parties prior to each hearing and proceeding before said Special Master and said reasons, grounds and objections are hereby incorporated herein by reference thereto and made a part as fully as if set forth at length, herein, in support of this motion."

"It is further ordered, to permit all interested parties to be advised, that the order of September 21, 1955, appointing the Special Master does not and cannot deprive plaintiffs of their right of trial by jury if their request therefor has been seasonably made, nor does it empower the Special Master ultimately to hear and determine the issues between the parties upon the trial of this cause, but does empower the Special Master to proceed in respect of legal questions to be ruled upon, subject to the court's approval, and to have such other powers, not including trial of the issues, as are described in Rule 53(c) of the Federal Rules of Civil Procedure, or otherwise stated in the order of appointment of September 21, 1955, and not inconsistent with this order."

The court was legally empowered to appoint a master to carry out the functions actually performed by the master in this case.

Under the circumstances, Judge Riley's ruling that plaintiffs waived any error that may have been committed in the appointment of Master Doerr was not erroneous. Failure to make timely objection to the appointment of a Master either at the time of the order or promptly thereafter constitutes a waiver of error and objections made only to the Master are unavailing.

Appellants' contention that the proceedings and orders of the Master were nullities is without merit. In any event there is no basis for the contention of appellants that the reference to the Master was entirely void and that his proceedings and orders were nullities. The power to refer is conferred in positive and unequivocal terms by Rule 53 and mere error in the exercise can only be corrected in direct proceedings. *Hart* v. *Williams*, 702 F.2d 190; *Coyner* v. *United States*, 7 Cir., 103 F.2d 629; *Smith* v. *Brown*, 5 Cir., 3 F.2d 926; *Flanders* v. *Coleman*, 249 F.2d 757, (rev'd on other grounds), 250 U.S. 223.

2. As to the Dismissal.

It is contended for appellants that they "were not contumacious" and that "their motives were not contumacious" in refusing to testify and in refusing to make the deposit for costs ordered by the court and that "dismissal was a harsh and unjustified penalty to impose upon confused laymen," but there is no claim that the individual plaintiffs did not fully understand that they were disobeying the order of the court when they refused to testify and when they refused to make the deposit or that their disobedience was other than wilful and deliberate.

Under Rule 37(d) and Rule 41(b) of the Federal Rules of Civil Procedure as well as in the exercise of its inherent power the District Court is authorized to dismiss the action of any individual plaintiff who wilfully disobeys a proper order of the court to compel the giving of security or the giving of testimony on deposition and to dismiss the action of a corporation plaintiff whose managing agent so offends. We think the contention that dismissal was unduly harsh or unjustified is without merit. It was the right of the plaintiffs to prosecute the action for the recovery of $120,000,000 against the defendants regardless of the burden it imposed on defendants, but only in the orderly course and in obedience to proper court orders. The Court would not have been justified in granting leniency or indulgence to the plaintiffs at the expense of the defendants. We find there was no abuse of discretion in the application by the Court of the sanction that was authorized by the Federal Rules of Civil Procedure, and by the inherent powers of the Court.

3. As to denial of right of Counsel.

It was strenuously urged that the plaintiffs were erroneously denied the right to be represented by counsel of their choice and many cases are cited to the effect that the right is held to be a fundamental one and the denial of it prevents according a fair trial.

The record shows that on the occasions when Strong and Gillmor refused to testify and when all plaintiffs refused to deposit the ordered security for costs, they asserted that they were without counsel of their choice and they based their disobedience to the Court's order on that claim. The trial court found that it was not in accord with the facts because there was no claim or showing that the firm of attorneys appearing on the complaint as of counsel (who now appear for them on this appeal) were not available to them and because they had requested and had been given opportunity to show any reason they had for distrusting and discharging their attorneys of record and they wilfully absented themselves from the hearing and that matter set by the Master and refused to afford proof of any reason for their alleged distrust. Upon their default it was found from the evidence adduced that they had no such reason for distrust and their attorneys were available to them. They took no steps to have the default entered against them set aside or the order entered by the Master vacated by the Court and the record does not indicate that they had any ground for such relief. It was necessary that the questions of their representation by counsel be settled in order for them to proceed with the case against defendants and it was so settled. It was their own conduct which prevented a change of attorney relationship and the fact that they were dissatisfied did not entitle them to disobey the court's orders or to block disposition of the case.

It is true the charges they made against their local attorneys were serious and if they had proven them when they were given the opportunity to do so, no doubt the attorneys would have been unconditionally discharged. But their mere accusations without proof conferred no right and supplied no excuse to plaintiffs for their disobedience of the Court orders.

The plaintiffs were not entitled as of course and without cause to an order unconditionally substituting other

counsel for the attorneys of record employed by them and it was within the discretion of the Court or Master to require that the attorneys be paid or secured as a condition to granting the request for substitution of new counsel.[10] *Doggett* v. *Deanville Corp.*, 5 Cir., 148 F.2d 381 and cases cited therein. *Woodbury* v. *Andrews Jergens Co.*, 2 Cir., 62 F.2d 49.

The record shows that after plaintiffs had refused to offer any proof of cause of their claimed distrust of their local attorneys of record and had defaulted at the hearing of that matter, Mr. Strong and in some instances the other individual plaintiffs with him, filed motions and other papers in the case assuming to represent the corporation or themselves or both in invoking Court action. But such filing was in conflict with the provisions of Rules 11 and 7 (b)(2) of the Federal Rules of Civil Procedure and would, if permitted to stand, have had the effect of nullifying the orders that had been made by the Court in respect to the attorney controversy and depositing security. Although appellants complain of the action of the Court in striking the filings which were made contrary to the provisions of the Rules, we do not find the ruling was erroneous.

Our conclusion on consideration of the whole record and all contentions is that appellants were accorded fair and just treatment by the trial court and that their own refusal to proceed in accord with Rules of Procedure and wilful and deliberate disobedience of the orders of the Court necessitated and justified the dismissal of the case with prejudice.

Affirmed.

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[10] On the evidence before him it appeared to the Master that the services the attorneys had performed were of the value of $200,000.00 but he held it open to plaintiffs notwithstanding their default to be heard on the question of the terms of the condition upon the discharge of the attorneys.

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 15,548

September Term, 1956
Friday, May 24, 1957

FIRST IOWA HYDRO ELECTRIC COOPERATIVE, F. A. E. GILLMOR, HARRY J. STRONG, AND HARRY IMEL, *Appellants*,

v.

IOWA-ILLINOIS GAS AND ELECTRIC COMPANY, IOWA POWER AND LIGHT COMPANY, IOWA SOUTHERN UTILITIES COMPANY, INTERSTATE POWER COMPANY, UNION ELECTRIC POWER COMPANY, KANSAS CITY POWER AND LIGHT COMPANY, IOWA ELECTRIC LIGHT AND POWER COMPANY, NORTHWEST LIGHT AND POWER COMPANY, WISCONSIN POWER AND LIGHT COMPANY, IOWA PUBLIC SERVICE COMPANY AND IOWA UTILITIES ASSOCIATION.

Appeal from the United States District Court for the Southern District of Iowa.

This cause came on to be heard on the record from the United States District Court for the Southern District of Iowa, and was argued by counsel.

On Consideration Whereof, it is now here ordered and adjudged by this Court, that the judgment of the said District Court, in this cause, be, and the same is hereby, affirmed.

May 24, 1957.

STATUTES INVOLVED

The Fifth Amendment to the United States Constitution provides in pertinent part:

> No person shall be * * * deprived of * * * property, without due process of law.

The Seventh Amendment provides in pertinent part:

> In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved * * *.

Rule 37 of the Federal Rules of Civil Procedure provides in pertinent part:

> (d) Failure of Party to Attend or Serve Answers. If a party or an officer or managing agent of a party wilfully fails to appear before the officer who is to take his deposition, after being served with a proper notice, or fails to serve answers to interrogatories submitted under Rule 33, after proper service of such interrogatories, the court on motion and notice may strike out all or any part of any pleading of that party, or dismiss the action or proceeding or any part thereof, or enter a judgment by default against that party.

Rule 41 of the Federal Rules of Civil Procedure provides in pertinent part:

> (b) Involuntary Dismissal: Effect Thereof. For failure of the plaintiff to prosecute or to comply with these rules or any order of court, a defendant may move for dismissal of an action or of any claim against him.

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No. 457

IN THE

Supreme Court of the United States

FIRST IOWA HYDRO ELECTRIC COOPERATIVE, F. A. E. GILLMOR, HARRY J. STRONG, and HARRY IMEL,
Petitioners,

v.

IOWA-ILLINOIS GAS AND ELECTRIC COMPANY, IOWA POWER AND LIGHT COMPANY, IOWA SOUTHERN UTILITIES COMPANY ET AL.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

REPLY TO RESPONDENTS' BRIEF IN OPPOSITION

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IN THE

Supreme Court of the United States

No. 457

FIRST IOWA HYDRO ELECTRIC COOPERATIVE, F. A. E. GILLMOR, HARRY J. STRONG, and HARRY IMEL,
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On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

REPLY TO RESPONDENTS' BRIEF IN OPPOSITION

The brief in opposition filed by respondents is largely devoted to an argumentative recital of alleged facts in the case, many of which are not relevant to the issues presented by the petition and which serve to obscure rather than clarify those issues. Of the numerous erroneous and incomplete statements made by respondents, we shall discuss here only those believed to

be germane to the legal issues presented and to the ultimate question whether the writ of certiorari should be granted.

I. The Improper Reference of the Entire Case to Special Master Doerr

In the petition it is pointed out that the "entire cause" was referred to Special Master Doerr and that this referral constituted an abdication of the trial court's responsibility (Pet. 5-6, 13-17). *La Buy* v. *Howes Leather Co.*, 353 U.S. 249. The brief in opposition creates several misleading impressions as to the critical facts with respect to this reference. By treating the reference as a continuation of the earlier, carefully limited reference to another master (to which petitioners consented) respondents imply that petitioners consented to the second reference (Brief in Opp. 2, 16). The fact is that petitioners never consented to the second reference; they repeatedly challenged it both through their counsel of record and *pro se* (Pet. 6-7).[1]

The statement of respondents that it "was not until after the master had recommended dismissal

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[1] Respondents erroneously imply (Brief in Opp. 12, note 7) that petitioners did not include in their *pro se* pleadings a specific attack upon the order appointing Master Doerr, but merely sought to expunge some 18 orders. Thus respondents say that petitioners are operating "on the apparent theory that this order [i. e., the order of reference of September 21, 1955 (R. 48)] was one of the 18 orders [requested to be expunged] and would have been affected by the mass 'expunging' proposed by Strong" (Brief in Opp. 12). In fact, petitioners explicitly objected to the order of reference (R. 93, paragraph 12) as pointed out in the petition (Pet. 7). In any event, the pleading was not stricken for lack of specificity but in purported enforcement of the master's order which limited petitioners to utterances through their attorneys of record (R. 103, 106).

of the action that plaintiffs moved the Court to vacate the appointment" (Brief in Opp. 16) is also misleading. It overlooks or disregards the repeated objections to the master's jurisdiction filed with the master and his repeated rulings that participation in the proceedings before him would *not* be construed as a waiver of objections to his appointment (Pet. 7). It overlooks or disregards the *pro se* pleading filed with the court on October 17, 1955 (Pet. 7; R. 89, 93; see note 2, *infra*) some months before the master purported on his own authority to dismiss the entire law suit as to two of the petitioners (December 22, 1955, R. 115).

Finally, respondents state that "When plaintiffs at length indicated to the Court that they construed the appointment order as affecting their right to trial by jury, the District Judge *promptly* issued an order negativing this view" (Brief in Opp. 16-17; emphasis added). This statement is based upon the respondents' persistent error in overlooking the *pro se* pleading of October 17, 1955 which explicitly indicated to the trial court that petitioners construed the appointment order as affecting their right to trial by jury.[2] And respondents neglect to point out that the judge's order purporting to interpret the order of reference was issued in January 1956 (Supp. R. 125) just before the final dismissal of the action and after the

[2] "That said Order appointed a new Master to pass upon findings of fact and conclusions of law and called for the payment of certain moneys and allowed a special master to pay out certain sums; that said Order was in derogation of plaintiffs' rights in that there was no provision for examination into the qualifications of the Special Master; in that it granted to a Special Master certain determinations which are reserved for a jury, and the plaintiffs, in this action, had requested a jury action" (R. 93).

master had proceeded under his sweeping delegation of plenary authority for several months (Pet. 6, 15).

Acting in reliance upon the express reference to him of the "entire cause" (R. 50), Master Doerr in effect tried the petitioners for misconduct and issued an unqualified order of dismissal with respect to some of them (R. 115). Moreover, he denied petitioners access to the district court (except through their openly hostile counsel of record) and directed the clerk of the court to strike physically from the files the *pro se* pleadings filed by petitioners (R. 106) even though those pleadings sought relief from the court against orders of the master (e.g., R. 86, 93).

In sum, the facts stated in the petition with respect to the reference to Master Doerr are correct. The trial court improperly delegated to the master its judicial duty of supervision of the pre-trial proceedings. The unfortunate events which led to the dismissal of this action flowed directly from that improper reference. For the reasons stated in the petition for certiorari (pp. 13-17), and in conformity with the policy of *La Buy* v. *Howes Leather Co.*, 353 U.S. 249, the judgment should be reversed.

II. The Impairment of Petitioners' Right to Effective Counsel

The central fact in this case is that petitioners were denied the right to discharge openly disloyal attorneys of record unless they first paid $200,000 in attorneys' fees (Pet. 7-10, 17-20). In the petition it was pointed out that the opinion of the Court of Appeals is silent with respect to the overt misconduct of petitioners' attorneys of record (Pet. 18), although much of that misconduct occurred on the record through utterances of those attorneys.

The brief in opposition, too, is silent on this critical point. Respondents have not undertaken to defend the astonishing behavior of petitioners' attorneys of record in publicly charging their clients with fraud, perjury and other misconduct (e.g., R. 57, 59, 62; Pet. 7-8, 10, 18) while insisting upon the right to continue to represent them. Respondents presumably recognize that such conduct cannot be defended.

Respondents erroneously suggest that petitioners had other attorneys available to represent them. Thus it is said that they "were at all times represented" by the undersigned attorney (Brief in Opp. 18). The fact is that the undersigned attorney never appeared of record in this proceeding until it had been finally terminated in the district court. He first appeared in connection with the filing of the notice of appeal from the judgment of dismissal (R. 156) and prior to entry of that judgment neither advised nor was consulted with respect to petitioners' controversy with their attorneys of record or with respect to the deposition proceedings or issues arising in those proceedings.

Any attempt to represent petitioners by attorneys other than the hostile attorneys of record would have been confronted with the master's order of October 5, 1955 precluding such representation except on onerous conditions (R. 70-71). Under the explicit order of Master Doerr, to whom the entire case had been referred (Pet. 5), only pleadings signed by *attorneys of record* could be filed.[3] Pursuant to Rule 5

[3] "No pleading or motion which may be tendered by plaintiffs for filing and which shall not be signed by an attorney of record for plaintiffs in accordance with the above cited rules shall be filed or received by the Clerk, except as may be specifically provided by my later order or by order of the court" (R. 106).

of the rules of the district court (Pet. 9, note 6), neither the undersigned counsel nor any other member of the law firm which appeared "of counsel" on the complaint (R. 22) qualified as an attorney of record while the case was pending before the district court. Petitioners' only attorneys of record were the hostile attorneys whom petitioners had unsuccessfully sought to discharge. Thus petitioners were without attorneys entitled to appear for them and in whom they had confidence, and they were not permitted (without payment of oppressive fees) either to obtain new counsel or to represent themselves. Indeed, even the pleading filed by the petitioners *pro se* in an effort to obtain review of the master's order on the motion to remove attorneys was ordered stricken (R. 86, 106).

In the light of the open disloyalty of the attorneys of record, the conduct of petitioners in failing to make the required deposit and to testify further in the deposition proceedings was both understandable and excusable, as is pointed out in the petition. The brief in opposition conveys a picture of repeated and wilful defaults by petitioners in failing to appear to present their position before the master and the court. The record, however, establishes that petitioners diligently attempted to present that position (e.g. Pet. 10, 11; R. 3, 5, 7, 11, 32, 41, 50, 86, 89). It is true that they failed to appear at the hearing on removal of their attorneys at a time when as the master was aware, they were seeking interlocutory relief from the Court of Appeals (Pet. 8). Shortly thereafter, they were barred from representing themselves by the master's order (R. 106), and their personal presence at subsequent proceedings (other than those at which they were directed to be present) served

no useful purpose.[4] They were not required legally or otherwise to be present in person and thus give tacit acquiescence to representation by attorneys whom they had been effectively prevented from discharging. Had they been present, they would have been forced to sit by in silence while their attorneys of record made statements contrary to petitioners' interests. (See Appendix, *infra* p. 1a.)

Petitioners found themselves in an impossible position as a direct result of the actions of the district court and the special master to whom the trial judge unlawfully delegated his judicial responsibilities. The trial court and master not only deprived petitioners of their right to loyal counsel in whom they had confidence; petitioners were effectively compelled to be represented by openly disloyal counsel. The court below has sanctioned an inroad upon the constitutional right of counsel, apparently on the implicit premise that it is more important that lawyers be able to compel payment of compensation for past legal work than that parties be allowed to obtain effective legal representation. The question presented is vital to the administration of justice. It should be definitely resolved by this Court.

[4] Thus, at one subsequent hearing in which petitioner Strong attempted to explain his position, the master ordered that "All statements made by Harry J. Stron[illegible] the course of this hearing, except the fact of his presence here, will be stricken from the record and will be given no effect" (R. 7).

CONCLUSION

For the foregoing reasons and those set forth in the petition for a writ of certiorari, the writ should be granted.

Respectfully submitted,

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October 18, 1957

APPENDIX

Excerpt From Record Containing Sample Derogatory Statements by Petitioners' Attorneys of Record (R. 13-14)

"In the course of the argument on the pending motions to dismiss the complaint, Mr. McManus responded as follows to a question from the Court as to suggested remedies for Mr. Strong's alleged misconduct other than dismissal (Tr. 34-35):

'I will have to confess that I myself am unable to explain or to justify Mr. Strong's conduct on any reasonable or rational basis. I have not talked to Mr. Strong since the 31st day of August of 1955. As everybody knows in this room, there has been a dispute between counsel of record and the plaintiffs in this case, especially Mr. Strong, but recently that situation has changed with respect to Mr. Imel, Mr. Mitzner and Mr. Naber, so that Mr. Mitzner and Mr. Imel and Mr. Naber have counselled with us this week as late as Tuesday, and apparently Mr. Strong is going down the same line that he has gone all along, by himself, but it has become increasingly apparent that the other directors are getting next to Mr. Strong, shall we put it.'

"He added the following (Tr. 35-36):

'The Special Master, Your Honor, as I understand the law, possesses no power to commit a person for contempt of court. That is only a power vested in the district judge, so that the only sanction that he could apply on the motion and the record that was made before him was to sustain or recommend the sustaining of the motion to dismiss filed by the defendants because of his refusal and failure to testify, and his failure and refusal to put up the $2,500.

'Now, in a discussion of this kind I must be fair and honest and frank with the Court, that I am of the opinion that at all times they had the

money to put up the $2,500, so that I don't know of any justification or excuse for the failure and refusal of First Iowa Hydro Electric Cooperative to make the $2,500 deposit into the registry of this court under the order that the Court has made, and I don't intend to attempt to justify that because the records of this court show that during the bankruptcy proceedings they produced in the neighborhood of $5,000. I am told, although I know it only by hearsay, that that $5,000 that was deposited has been released and is in the hands of the lawyers who represented the First Iowa Hydro Electric Cooperative in the bankruptcy proceedings.'

"Mr. McManus further stated:

'We have advised all of these plaintiffs to testify and have requested them to testify, so that if this case is dismissed it penalizes the lawyers who are innocent of any wrongdoing' (Tr. 37).

"During further discussions with the Court Mr. McManus stated that he would 'not attempt to explain or to justify or to excuse the conduct of Mr. Strong' (Tr. 38). Of Mr. Gillmor, he said (Tr. 38):

'Mr. Gillmor is a very old man who is under the domination of Mr. Strong and who is being led by Mr. Strong. If left to his own devices I am certain that Mr. Gillmor would do what was right. He is a high minded old gentleman possessed of his ideals, but he is being influenced and led by Mr. Strong, so that Mr. Strong by his wilfull conduct is penalizing the other four directors and the attorneys of record for the plaintiffs, so that I ask the Court to devise some means to keep the law suit in court in order to afford us time and opportunity to try to get the situation straightened out.'

"When the Court stated of Plaintiff Strong that 'He has been guilty of contumacious conduct as one could possibly be guilty of' (Tr. 39), Mr. McManus replied: 'I agree with Your Honor' (Ibid.)."

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1957

FIRST IOWA HYDRO ELECTRIC COOPERATIVE, ET AL., *Petitioners,*

vs.

IOWA-ILLINOIS GAS AND ELECTRIC COMPANY, ET AL., *Respondents.*

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1957

NO. 457

FIRST IOWA HYDRO ELECTRIC COOPERATIVE, F. A. E. GILLMOR, HARRY J. STRONG, and HARRY IMEL,

Petitioners,

vs.

IOWA-ILLINOIS GAS AND ELECTRIC COMPANY, IOWA POWER AND LIGHT COMPANY, IOWA SOUTHERN UTILITIES COMPANY, ET AL.,

Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 245 F. 2d 613. No petition for rehearing was presented to that Court. The Memorandum of Decision and Order for Judgment of the District Court is set forth in the Appendix.[1]

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1. The Appendix to this brief is cited herein as "R. App." References to the petition for writ of certiorari will be cited as "Petition". References to appellants' Record and Appellees' Supplemental Record below will be cited as "R" and "S. R." respectively.

QUESTIONS PRESENTED

The questions presented by petitioners fail to express the issues in the terms and circumstances of the case. With due respect for the entire record, the questions presented are:

1. Whether plaintiffs may complain of the action of the District Court in dismissing the case for wilful disobedience of orders and refusals to testify and to prosecute the cause, on the ground that the appointment of a master was improper when (a) they consented to the appointment of a master to supervise discovery depositions, (b) the Court later enlarged the master's powers to enable him to hear a collateral dispute between plaintiffs and their local counsel, which the master heard at plaintiffs' request, (c) the Court expressly ruled that the master had no authority as to trial of the case, (d) they did not move the Court to vacate the appointment until the day before hearing on dismissal, and (e) the master did not in fact exercise any powers except those relating to the discovery proceedings and the attorney dispute.

2. Whether plaintiffs may complain of the action of the District Court in dismissing the case for wilful disobedience of orders and refusals to testify and to prosecute the cause, on the ground that they had been deprived of counsel of their choice, when (a) they deliberately absented themselves from a hearing set by the master at their request on their motion to remove their local counsel, and failed to reopen or seek review of the ensuing default order, (b) they deliberately absented themselves from a subsequent hearing set by the master to rule upon their attempts to act *pro se* in the cause, and failed to reopen or seek review of the ensuing default order, (c) they deliberately absented themselves from final hearing by the Court on all contested issues, and (d) they were at all times

represented by and had available to them other counsel of whom they did not complain.

3. Whether plaintiffs may complain of the action of the District Court in dismissing the case for wilful disobedience of orders and refusals to testify and to prosecute the cause, on the ground that their conduct should be excused as resulting from allegedly erroneous orders, in view of the entire course of plaintiffs' conduct, including their persistent refusal to proceed with discovery, their deliberate disruptions of the deposition for the purpose of avoiding testimony concerning financial transactions, their calculated absence from proceedings set for them by both the District Judge and the master, and their wilful refusals to obey orders of the Court to post security for costs and to testify on deposition, thereby disobeying and collaterally attacking unrevoked and unreversed orders of a Court and master having jurisdiction.

STATEMENT OF THE CASE

The suit below was instituted on February 18, 1954, and nearly two years later, on January 25, 1956, was dismissed by the District Court for plaintiffs' disobedience of judicial orders and failure to prosecute.

This action was brought by five individuals and their wholly-owned corporation, which was organized as an Iowa cooperative, to recover treble damages in the amount of $120,000,000.00 for alleged violations of the antitrust laws which were charged to have prevented plaintiff First Iowa Hydro Electric Cooperative, since 1938 to the date of the complaint, from ever starting to do business (R. 15). The cooperative is the alter ego of the five individual plaintiffs (three of whom are petitioners herein), each of whom claims a one-fifth interest therein, for which he paid a membership fee of two dollars (R. 15; S. R. 2). They proposed to construct a hydroelectric project to be financed entirely

by the public sale of $60,000,000 in 40-year bonds to be secured by contemplated assets of $55,962,000 (S. R. 2).

The cooperative was conceived and organized, and at all times has been directed, by plaintiff Harry J. Strong, its Secretary-Treasurer, General Manager, and Director, who has devoted his full time to its promotion since 1938. It obtained funds from time to time by the solicitation of contributions from interested persons (S. R. 32, 42-4, 77, 79, 135-7, 140). Strong furnished to plaintiffs' attorneys the information on which the complaint was based (S. R. 33).

After the filing of the complaint, which was phrased in general terms (App. 4a), defendant Union Electric Power Company served notice of the taking of plaintiffs' depositions. The District Court stated that, in order to avoid inconvenience to plaintiffs, all defendants desiring to interrogate them should join in the depositions (S. R. 1, 3-4). However, due to plaintiffs' failure to comply with commitments regarding production of documents and witnesses (S. R. 16-7, 20-6; R. 25), no depositions actually commenced until, 15 months later, the District Court expressly ordered Strong to testify on June 6, 1955; and, in implementation of this order, the Court appointed a special master to supervise the depositions, his compensation to be paid by defendants (R. 23). The order provided that the master should have "such other powers as the court may by order later prescribe" (R. 24). The appointment was made with the express consent of all parties (S. R. 31, 32, 58-60, 146), and plaintiffs filed no objections to the order despite notice that any objections should be filed on or before June 2 (R. 24).

At the commencement of Strong's deposition on June 6, appearances for plaintiffs were entered by attorneys James R. McManus of Des Moines, Iowa, James D. France and Xavier C. Nady of Tipton, Iowa, for themselves and

for Allan R. Shepherd of Des Moines, Iowa, and for Haley, Doty & Wollenberg of Washington, D. C.[2] (S. R. 28).

In his deposition Strong persistently disavowed a present recollection of matters under interrogation while giving daily assurances that many facts would ultimately be recalled by him (S. R. 33-50). On June 22, in refusing to limit examination, the master observed (S. R. 49):

> "But even in the deposition itself, the bulk of the time has been used in inquiring of Mr. Strong what facts he had, what facts he knew of, to substantiate things, and so far I don't think any of them are down to anything except, 'Well, there are more' • • •."

On June 21 inquiries were made concerning the finances of the cooperative. Strong admitted that the cooperative had never had a bank account in its own name, that its funds were carried in his own personal bank account, and that he had "no way of knowing" how much of $138,029.59 in contributions reflected in the cooperative's records had gone through his personal account. He was questioned how he accounted for the difference in the amount of money collected and the amount of money spent, and his reply was "I have no answer for it." He stated that he would not produce his "personal" records for the defendants to "hash over" and that "It is none of your business." On June 22 his counsel refused to permit further questioning with respect to cooperative finances (S. R. 41-5), and after hearing the master ordered the production of Strong's personal bank records because of his commingling of funds (S. R. 45-51). A two-week continu-

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2. The Washington law firm of Haley, Doty & Schellenberg appeared of counsel in the complaint. Prior to the deposition Mr. Wollenberg had succeeded Mr. Schellenberg. Plaintiffs never attempted to discharge their Washington counsel; and Mr. Wollenberg, now of Haley, Wollenberg & Kenehan, represented petitioners in the Court of Appeals and now brings this petition for certiorari on their behalf.

ance was then ordered by the master at plaintiffs' suggestion (S. R. 51).

Upon reconvening plaintiffs initiated an attack, which they have not defended on appeal, upon the probity of the master, accusing him of "partisan interest" as allegedly demonstrated by his production order, and obtained another continuance of the deposition in order to file an application with the Court for his removal (S. R. 53). After hearing, the Court denied the motion, ordered the resumption of the deposition and observed (S. R. 56, 59):

> "It is significant that no objection was raised to the qualification of the master until the adverse rulings came on the matters affecting the bank account of Mr. Strong."

Strong never again resumed the witness stand. On July 12 his deposition stood uncompleted by Union, and none of the other defendants ever had an opportunity to examine him. In the intervening six months prior to the dismissal, plaintiffs or their counsel obtained six continuances (S. R. 55, 60-2, 68-9, 71-2, 73, 114), raised diversionary matters not involving defendants, including attacks on the Court, both masters, and their local counsel (R. 78, 32, 41; S. R. 53-61), and attempted two interlocutory appeals to the Court of Appeals (R. 77; S. R. 113). Finally, they wilfully refused to comply with Court orders to deposit security for costs (R. App. 11a; App. 29a), and plaintiffs Strong and Gillmor wilfully refused to testify on three separate occasions (S. R. 91, 120, 130).

On July 13 Strong and attorney McManus engaged in a fist-fight in a hotel room (R. 58, 35, 44), but they were subsequently reconciled (S. R. 78, 81-2), and in Strong's undissenting presence McManus presented plaintiffs' attack on the master to the District Court on July 21 (S. R. 56).

By their own admission plaintiffs did not "lose faith" in their local attorneys before August, 1955 (S. R. 100), after a trip Strong made to Chicago to raise litigation monies.

The dispute between plaintiffs and their local counsel grew out of a controversy over the disposition of these monies. On July 25 Strong went to Chicago with Jake More, general counsel for the cooperative, where they met one Joseph P. Condon, one Seth Gooder and one Lloyd Drexler. Strong told them that he was very pleased with his lawyers, who were doing a good job, and that he wanted to raise a $25,000 fund to finance the continuation of the litigation (S. R. 77-82).

Drexler and Condon each delivered checks for $5,000 to Jake More to be held by him until the balance of the fund had been raised, and Gooder agreed to send Strong $5,000 at such time. It was stipulated that the fund was to be used solely for litigation expense, that none of it was to be used for Strong's personal living requirements, and that Strong was to pay $10,000 from the fund to plaintiffs' local counsel for attorneys' fees and expenses (S. R. 78, 81).

On July 31 Strong represented to Jake More that he had raised more than enough to complete the $25,000, and More forwarded the Drexler and Condon checks to him. Gooder likewise sent Strong his promised $5,000 (S. R. 80-1). Strong later admitted to attorney Nady that he had lied and that he had not raised the balance of the $25,000 (S. R. 83).

Instead of paying his attorneys as he had promised, Strong procured Rock Island, Illinois lawyers to file their appearance as "associate attorneys" for plaintiffs, to which plaintiffs' local counsel responded with a motion to quash (R. 28). At the ensuing hearing before the District Judge on September 2, the Rock Island attorneys withdrew their appearance, stating they had been "taken in" on the

case (S. R. 66). Strong personally addressed the Court, asserting that plaintiffs had "lost faith" in their local counsel as of September 1 (R. 35; S. R. 64); he accused his attorneys of "stink" and "trickery," alleged that they were discharged, and started to walk out of the courtroom while being addressed by the Court, but was dissuaded by the Judge (S. R. 63-8).

The Court advised plaintiffs that they could employ other counsel in their attorney dispute (S. R. 68) and offered to hear the matter personally either in Des Moines on September 8 or in Davenport during the term commencing September 12 (S. R. 70). At Strong's oral request the Court ordered an indefinite postponement of his deposition to permit plaintiffs to settle the matter of their representation (S. R. 68-9, 71).

Plaintiffs took no action on their attorney dispute until the Court ordered that Strong's deposition be resumed on October 3 (S. R. 71-2). This order was entered September 15, and the next day plaintiffs filed a motion to remove their local attorneys of record. The motion was filed *pro se*, with the sworn statement that it had been impossible for plaintiffs to hire qualified attorneys to represent them in their attorney dispute (R. 41, 42). Subsequently plaintiffs stated under oath that this motion had been prepared upon the advice of an attorney whom they had hired[3] (S. R. 101).

3. Plaintiffs were in fact surrounded by counsel. Mr. Wollenberg's firm and its predecessor have appeared in this case from the time the complaint was filed to the present day (R. 22, 156; S. R. 28). In addition to the anonymous lawyer who counseled them on their motion to discharge their attorneys (S. R. 101), plaintiffs swore on October 17 that they had contacted counsel who were prepared to go to trial on the merits within thirty days (R. 100). Mr. Jake More, a practicing attorney, had represented the cooperative for many years as general counsel until August 31, 1955 (S. R. 85); and plaintiff Imel testified on January 17, 1956, that John Kerwin, a practicing Illinois attorney, had been retained and consulted "in the past few months or so" (S. R. 141). The record contains additional reference to the availability of other counsel (S. R. 121).

The special master having resigned, on September 21 the Court appointed a successor master and, referring to the attorney dispute, enlarged his powers to comprehend those permitted by Rule 53. Plaintiffs and defendants were ordered to deposit $2,500 with the clerk, as security for the master's fees and disbursements, with the specific proviso that defendants should continue to pay the costs of the discovery depositions (R. 48-50, 53). On September 23 Strong wrote the master requesting a prompt hearing of the attorney dispute and a further delay in his deposition (S. R. 103). In response, the master set the dispute for hearing on October 3 (R. 54), gave plaintiffs a third reminder of their right to counsel (S. R. 8; R. 52, 54), and ordered another continuance of Strong's deposition (S. R. 73).

None of the plaintiffs appeared at the hearing on October 3, nor did any attorneys appear for them (R. 70, 72; S. R. 75). That morning Strong telephoned the master from St. Paul, Minnesota to announce that he and Imel were proceeding in the Court of Appeals for an injunction and stay order[4] and that none of the plaintiffs would attend the hearing (S. R. 75). Despite petitioners' inference to the contrary (Petition 8), neither Strong nor any other plaintiff requested a continuance (R. 105, 1-2). Strong's telephone call was the first the master had heard from any plaintiff in the two weeks since Strong had requested a speedy hearing.[5] The whereabouts of the other individual plaintiffs was not explained although all of them had been in Davenport the day before to verify their Eighth Circuit application (S. R. 100).

4. This application, filed without notice, was denied by the Eighth Circuit on the same day (R. 77).

5. This telephone call on the morning of the hearing date is the advance "advice" to the master referred to on page 8 of the petition (S. R. 75).

No explanation has ever been advanced for plaintiffs' failure to appear on October 3 and support their charges by testimony subject to cross-examination. It is noteworthy that on the day judgment of dismissal was entered plaintiffs Mitzner and Naber filed with the Court a "Retraction" which stated in part as follows (S. R. 158):

> "We desire that this court know that all charges made against said counsel by plaintiffs were baseless and without foundation in fact and are now convinced that said misrepresentations were ruthlessly manufactured by a person seeking to serve his own selfish ends and purposes."

The master declared plaintiffs to be in default and heard testimony by the local attorneys and others. The evidence established that plaintiffs' "loss of faith" coincided with Strong's refusal to pay the attorneys the money he had solicited for that purpose, and that prior to this refusal plaintiffs had been unstinting in their praise of their attorneys (S. R. 75-88).

The master ruled on October 5 that plaintiffs had a right to remove their attorneys subject to the payment of reasonable fees, which on the evidence before him he found to be $200,000; but he also held that plaintiffs might reopen the matter to show a lack of means sufficient to pay the fees and apply "for a consequent reduction thereof upon just terms", or that they might seek imposition of an attorneys' lien in lieu of payment (R. 70, 72, 76). Plaintiffs neither explained their default nor attempted to have it set aside, neither applied to the master for a reduction in fees nor for the substitution of an attorneys' lien, and never sought a review of the ruling by the District Court.

Plaintiffs remained silent until the morning of October 10, scheduled for the resumption of Strong's deposition. At

9:35 a.m. that day, Strong filed *pro se* an affidavit of prejudice, charging that District Judge Riley "has a personal bias and prejudice against our project, a hydroelectric development on the Cedar River."[6] (R. 78, 79; S. R. 91). Strong then proceeded to the deposition room where counsel, the commissioner, and the court reporters were assembled before the master, and demanded that all further proceedings be deferred until the questions raised by the affidavit had been determined. The master denied a further postponement and advised Strong to testify, to which he replied, "And I shall decline", and walked out of the room (S. R. 90-1). Thereafter defendants moved for dismissal (R. 82).

On October 17, plaintiffs filed *pro se* over 120 pages of papers, which included a motion to expunge Strong's deposition from the record for alleged inadequacies in the transcript (S. R. 95), to expunge the master's October 5 ruling on the motion to remove their attorneys (R. 86), to expunge the District Judge's order setting the affidavit of prejudice for hearing (S. R. 98), to expunge an order of the master setting defendants' motion to dismiss for hearing (S. R. 96), and a resistance and application for affirmative relief which asked that all orders subsequent to September 2 (the date plaintiffs first claimed a loss of faith in their counsel) be expunged, that their attorneys be discharged,

6. Hearing on it was held by Judge Riley, after notice to plaintiffs personally (S. R. 94), but neither Strong nor any other plaintiff troubled to appear (S. R. 105), nor was the subsequent overruling of the affidavit assigned as error on appeal (S. R. 106).

and that the cause be set for trial in thirty days[7] (R. 89; S. R. 100).

Inasmuch as these papers were filed in defiance of the October 5 default order, the master on October 24 ordered that plaintiffs appear at a hearing on October 28 to show cause why an order should not be entered striking them (S. R. 107; R. 103). Despite personal notice, plaintiffs chose not to appear on October 28, and the documents were ordered stricken (S. R. 107-9; R. 103). Plaintiffs have never advanced an excuse for this default; they neither sought to reopen the matter nor asked the District Court to review the master's order[8]; and they did not assign his ruling as error on the appeal from final judgment (App. 22a).

On November 18, 1955, hearing was had on defendants' motion to dismiss (S. R. 109). The master made extensive findings supporting a dismissal recommendation (R. 108-14), but accorded Strong a further opportunity to testify (R. 113).

A month elapsed, during which plaintiffs did not per-

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7. In note 4 on page 7 petitioners erroneously state that a petition to vacate the appointment of a master was filed on October 17 and is found at R. 86; the cited document obviously refers only to the attorney dispute and not to the master's appointment. The statements in the text at pages 7 and 14 to the effect that a petition to vacate the order of reference is found at R. 89, 93 are also erroneous. The cited document is a twofold motion entitled "Resistance to Defendants' Motion to Dismiss and Application for Affirmative Relief," which requested that the Court expunge eighteen orders issued after September 2, or everything in the record after the plaintiffs "lost confidence" in their counsel; and petitioners now characterize this motion as a petition to vacate the order of reference on the apparent theory that this order was one of the 18 orders and would have been affected by the mass "expunging" proposed by Strong.

8. On November 28 Strong, Gillmor and Naber bypassed the District Court and attempted an interlocutory appeal to the Eighth Circuit from the master's October 28 order. The appeal was subsequently dismissed for want of jurisdiction (S. R. 167). *Gillmor v. Iowa-Illinois Gas & Electric Co.* (1956), 8 Cir., 230 F.2d 947.

sonally contact either the master or the District Court; and on December 20 Strong again refused to testify upon his deposition, declaring "I will chance the dismissal" of the action (S. R. 120).

The master ruled on December 22 that the cause should be dismissed as to Strong and the cooperative because of his refusal to testify (R. 115) and ordered plaintiff Gillmor, president of the cooperative, to commence his deposition on January 10, 1956 (S. R. 122). On that date Gillmor appeared, refused to testify, and while being addressed walked out of the hearing room (S. R. 130). The master ruled on January 16 that the cause should be dismissed as to Gillmor and the cooperative (R. 128).

Plaintiffs' defiance of court-ordered depositions was not the only example of their contempt for lawful authority. The security for costs ordered by the Court on September 21 and again on September 27 was never paid by plaintiffs; no suggestion was ever made to the Court of lack of funds, and no excuse was ever offered to the Court for plaintiffs' failure to make the deposit (R. App. 11a, R. 50, 53, 148). It is undisputed that in August, 1955 Strong, on behalf of all plaintiffs, had received $15,000 from strangers interested in promoting the litigation (S. R. 78-81). Strong later admitted that he had funds with which to make the deposit and that he had in fact purchased a bank draft for $2,500 on September 28 but had declined to deposit it (S. R. 117-8). The bankruptcy proceedings against the cooperative were not commenced until sometime after October 10 (S. R. 112-3), and it was not until November 29 that Strong turned over to the bankruptcy receiver cash

in the sum of $5,081.81[9] (S. R. 118). The record is silent as to what happened to the remainder of the $15,000 acquired by him on August 1. No showing or claim has ever been made that the individual plaintiffs were unable to comply with the deposit orders. In fact, on October 17, plaintiffs undertook to strike a bargain with the District Court, stating under oath that, if the case were set for trial in 30 days and if advised to do so by attorneys in whom they had confidence, they would pay into the registry of the Court their share of the costs (R. 100).

In a petition for review of the master's report, plaintiffs, by their local counsel, on January 3, 1956 for the first time raised the contention before the District Court that the order of September 21, 1955 appointing a successor master was illegal and void and deprived plaintiffs of the right of

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9. On page 12 of the petition it is charged that the cooperative receiver in bankruptcy tendered the $2,500 deposit to the District Judge on October 13, and that such tender was rejected. No record reference is made because this statement is entirely outside the record in this case. It is purportedly derived from a receiver's report in the record in the bankruptcy proceedings, instituted by the Chicago contributors, to which these respondents were not parties. This report, bearing Strong's initials, was filed September 19, 1956, nine months after the cooperative was adjudged not a bankrupt and during the last illness of Judge William F. Riley. Mr. Wollenberg promptly thereafter transmitted to all defense counsel a photostatic copy of the report, certified on the very date it was filed, and proposed to advert to it before the Court of Appeals. The facts are that the petitioning creditors, who were acting adversely to plaintiffs (S. R. 104), handed a check to Mr. Ryan prior to his qualification as receiver, and on the Court's advice the check was returned to Mr. Ryan with the statement that it could be tendered after his qualification. No such tender was ever made. Defense counsel advised Mr. Wollenberg of the misleading nature of the report in this regard and that, in their opinion, any reference to it would be improper. He thereafter took no action under the Rules to incorporate any of these facts in the record in this case, nor did he refer to them in the Court of Appeals.

trial by jury[10] (R. 116). The Court promptly ruled that the order "does not and cannot deprive plaintiffs of their right of trial by jury * * * nor does it empower the Master ultimately to hear and determine the issues between the parties upon the trial of this cause" (S. R. 125). After the Court had set all questions of dismissal for hearing on January 20, plaintiffs for the first time filed on January 19, 1956 a motion to vacate the order of September 21, 1955 appointing a successor master (R. 138; S. R. 125, 142).

All issues were brought on for hearing before the District Court on January 20: the dismissal recommendations of the master, the legality of his appointment, defendants' motions to dismiss, and plaintiffs' failure to deposit security for costs (R. App. 1a-2a). Plaintiffs' local attorneys appeared, as they had at all proceedings since October 3, and contested the dismissal (S. R. 144-50, 89, 105, 107, 109, 116, 126, 133, 137, 159). By order of the Court, all plaintiffs were given personal notice of the hearing (S. R. 125, 142-3, 166), and the Court inquired whether any of the plaintiffs were present in the courtroom (S. R. 144); but they did not appear (R. 151) and thus added boycott to their defaults of October 3 and 28.

On January 25, 1956, the Court filed its Memorandum of Decision and Order for Judgment and ordered the cause dismissed under Rules 37(d) and 41(b) and the inherent power of the Court (R. App. 1a, 16a-17a). Twenty-two days later plaintiffs' Washington counsel filed notice of appeal (R. 155-6).

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10. All prior objections to the appointment of a master had been made to the master, not to the Court (S. R. 75, 108, 109, 116, 127).

REASONS FOR DENYING THE WRIT

I.

The Appointment of a Master Was Not in Conflict with La Buy v. Howes Leather Company, and Did Not Excuse the Refusal of Plaintiffs to Obey Orders of the District Court.

In an effort to elevate this sordid tale of planned and wilful defaults and insolences to the level of a question meriting the attention of this Court, petitioners contend that the appointment of a master in the instant case was in conflict with the decision in *La Buy* v. *Howes Leather Company* (1957), 352 U.S. 249, and that they were accordingly privileged in their defiance of judicial orders.

The *La Buy* decision did not purport to repeal Rule 53 of the Federal Rules, and the factual situation in the instant case is not remotely comparable. A master was first appointed with power to supervise depositions ordered by the Court, and the appointment was made with the express consent of all parties. When plaintiffs embroiled themselves in a dispute with their local counsel, the Court expanded the master's powers to include the right to hear that controversy, and plaintiffs promptly invoked the master's aid in this matter. It was not until after the master had recommended dismissal of the action that plaintiffs moved the Court to vacate the appointment.

The reference of an attorney dispute has been expressly sanctioned by the courts. *In re Badger*, 2 Cir., 9 F. 2d, 560, 562; *In re Weitling*, 266 N.Y. 184, 194 N.E. 401; see *Hyman* v. *Pottberg's Ex'rs.*, 2 Cir., 101 F. 2d 262; *Fisher Studio* v. *Loew's Inc.*, 2 Cir., 232 F. 2d 199, 201, *cert. den.* 352 U.S. 836. All of the other acts of the master involved the progress of pretrial depositions and, like the attorney dispute, were not concerned with trial on the merits. When plaintiffs at length indicated to the Court that they construed the

appointment order as affecting their right to trial by jury, the District Judge promptly issued an order negativing this view. We submit that the Court of Appeals correctly ruled that this limited and special use of a master does not conflict with the *La Buy* decision.

In any event, the legality of the master's appointment is not pertinent to plaintiffs' refusals to testify. Those refusals violated subsisting and unchallenged Court orders and rendered applicable Rules 37 and 41, whether or not a master had ever been appointed.

II.

Having Defaulted on the Numerous Opportunities Given Them by Court and Master to Act in Their Attorney Dispute, Plaintiffs Cannot Unilaterally Refuse to Proceed on the Ground of Lack of Counsel.

Matters relating to the discharge or substitution of attorneys of record in a pending case are subject to the supervision of the court. *Woodbury* v. *Andrew Jergens Co.*, 2 Cir., 69 F. 2d 49; *Doggett* v. *Deauville Corporation*, 5 Cir., 148 F. 2d 881; *John Griffiths & Son Co.* v. *United States*, 7 Cir., 72 F. 2d 466; *In re Badger*, 2 Cir., 9 F. 2d 560; *Curtis* v. *Richards*, 4 Ida. 434, 40 P. 57; *White* v. *Aiken*, 197 Ga. 29, 28 S.E. 2d 263.

In the exercise of this authority, the District Judge gave plaintiffs a choice of dates on which they could bring the attorney dispute before him. They did not avail themselves of this opportunity and took no action until pressed by the order for the resumption of Strong's deposition, whereupon at their request they were granted a speedy hearing by the master and defaulted. Having thus been afforded full opportunity for a judicial examination of their grievances, plaintiffs cannot now complain of the consequences of their own conduct.

When plaintiffs disregarded the master's conditional order by filing a great bulk of *pro se* documents, and the

master gave them notice to appear and show cause why an order should not be entered striking them, plaintiffs again disdained to appear. At no time did they appear before the District Judge, for any purpose, subsequent to his invitation on September 2, 1955; they failed even to appear and explain their conduct at the hearing on dismissal, although personally notified by order of the Court.

It avails plaintiffs nothing, in the face of their defaults, to refuse to obey judicial orders and to testify, on the claim of want of counsel. Even if their claim were true, their status was one they selected and maintained. But in reality the claim was false. Although they posed before the Court as being without counsel of their choice, the record contradicts the pose. They were at all times represented by Mr. Wollenberg and, in addition, consulted anonymous attorneys on the side throughout these proceedings.

The Court of Appeals correctly refused to permit plaintiffs to play cat-and-mouse with the District Court by ignoring its proceedings and later complaining to an upper court that the lower court should have given them more protection in their wilful absence.

III.

Petitioners' Entire Course of Action Fully Warranted the Exercise of the Discretion of the Two Lower Courts.

The entire course of events in this cause shows a planned campaign to make a mockery of the judicial process and a persistent course of interruption and delay. The attack upon the first master, not defended on appeal, at an embarrassing juncture in the deposition; the filing, just before deposition time, of an affidavit of prejudice, the hearing on which they declined to attend; the requesting of a hearing from the master, and, when it was granted, leaving town without prior notice to seek a stay order from the

Court of Appeals; the total ignoring of the numerous hearings, notice of which the Judge and master consistently ordered served personally upon the individual plaintiffs; and, as the culmination of these activities, the refusals to comply with the Court's deposit orders and the final refusals to testify on Court-ordered depositions—all show a studied contempt for the judicial process and a deliberate refusal to progress the cause except on terms dictated by plaintiffs. As both lower Courts found, their conduct was prejudicial to these defendants (R. App. 15a; App. 25a, 29a).

Under circumstances far less contumacious than these the courts have applied the sanctions provided by the rules. *Peitzman v. City of Illmo*, 8 Cir., 141 F. 2d 956, 960, *cert. den.* 323 U.S. 718; *Mooney* v. *Central Motor Lines*, 6 Cir., 222 F. 2d 569; *Collins* v. *Wayland*, 9 Cir., 139 F. 2d 677, *cert. den.* 322 U.S. 744; *Fischer* v. *Dover Steamship Co.*, 2 Cir., 218 F. 2d 682; *Vaughan* v. *First National Bank of Greenville, Miss.*, 5 Cir., 218 F. 2d 804, *cert. den.* 350 U.S. 854; *Carpenter* v. *Carpenter*, App. D.C., 156 F. 2d 857; *Refior* v. *Lansing Drop Forge Co.*, 6 Cir., 124 F. 2d 440, *cert. den.* 316 U.S. 671.

Petitioners' argument to this Court is that their deliberate and wilful defiance of rulings and orders of the Court and master should have been excused because these rulings and orders were erroneous. But it is fundamental to judicial process that parties are not entitled to take the law into their own hands and set at naught judicial orders which they dislike. *Howat* v. *Kansas*, 258 U.S. 181, 190; *Gompers* v. *Bucks Stove & Range Co.*, 221 U.S. 418, 450; *Toy Toy* v. *Hopkins*, 212 U.S. 542, 548; *United States* v. *United Mine Workers of America*, 330 U.S. 258, 293; *Johnson* v. *Wilson*, 9 Cir., 118 F. 2d 557, 560; 1 *Freeman on Judgments* (Rev. 5th Ed.) § 394, p. 844.

In a very real sense the choice here is between order and anarchy. As this Court stated in *Gompers* v. *Bucks Stove & Range Co.*, 221 U.S. 418, 450:

> "If a party can make himself a judge of the validity of orders which have been issued, and by his own acts of disobedience set them aside, then are the courts impotent, and what the Constitution now fittingly calls 'the judicial power of the United States' would be a mere mockery."

CONCLUSION

Upon the record in this cause we submit the petition for writ of certiorari should be denied.

Respectfully submitted,

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APPENDIX

UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF IOWA, DAVENPORT DIVISION

Civil No. 1-224

FIRST IOWA HYDRO ELECTRIC COOPERATIVE, F. A. E. GILLMOR, CARL J. MITZNER, HARRY J. STRONG, HARRY IMEL, AND P. H. NABER, *Plaintiffs*,

v.

IOWA-ILLINOIS GAS AND ELECTRIC CO., IOWA POWER AND LIGHT CO., IOWA SOUTHERN UTILITIES CO., INTERSTATE POWER CO., UNION ELECTRIC POWER CO., KANSAS CITY POWER AND LIGHT CO., IOWA ELECTRIC LIGHT AND POWER CO., NORTHWEST LIGHT AND POWER CO., WISCONSIN POWER AND LIGHT CO., IOWA PUBLIC SERVICE CO., IOWA UTILITIES ASSOCIATION, *Defendants*.

MEMORANDUM OF DECISION AND ORDER FOR JUDGMENT*

The following matters were heard by the Court with consent of all parties and were submitted on January 20, 1956:

1. The motions of defendants to dismiss the complaint as to plaintiff Harry J. Strong and all other plaintiffs, filed on October 10, 1955.

2. The Report of the Special Master filed on January 4, 1956, and his order filed December 22, 1955.

3. The motions of defendants to dismiss the complaint as to plaintiff F. A. E. Gillmor and as to plaintiff First Iowa Hydro Electric Cooperative, filed January 16, 1956.

* R. 139-154.

4. The Supplemental Report of the Special Master filed January 17, 1956, and his order filed January 16, 1956.

5. The Petition for Review filed by plaintiffs on January 3, 1956, and their Petition for Review filed January 19, 1956.

6. The exceptions and objections of plaintiffs to the January 4, 1956 Report of the Special Master, filed January 19, 1956.

7. The objections and exceptions of plaintiffs to the January 17, 1956 Supplemental Report of the Special Master filed January 19, 1956.

8. The motion of plaintiffs to vacate the order appointing the Special Master, filed January 19, 1956.

9. The motion of defendants to strike plaintiffs' motion to vacate order appointing Special Master, made in open court on January 20, 1956.

10. The motion of defendants renewing that portion of their October 10, 1955 and their January 16, 1956 motions to dismiss for failure of plaintiffs to comply with the Court's deposit orders of September 21 and September 27, 1955, made orally in open court on January 20, 1956.

Plaintiffs appeared by their attorneys of record, James R. McManus, Allan R. Shepherd, Xavier C. Nady and James D. France, Union Electric Power Company appeared by its attorney, Robert H. Walker. Iowa-Illinois Gas and Electric Company appeared by its attorney, Larned A. Waterman. Iowa Power and Light Company appeared by its attorney, Howard A. Steele. Iowa Southern Utilities Company appeared by its attorneys, Maxwell A. O'Brien and Robert Valentine. Interstate Power Company appeared by its attorneys, E. Marshall Thomas and Clement F. Springer. Kansas City Power and Light Company appeared by its attorneys, Joseph J. Kelly, Jr. and Earl Smith. Iowa Electric Light and Power Company and

Northwestern Light and Power Company appeared by their attorneys, V. Craven Shuttleworth, Tyrrell M. Ingersoll and Harry E. Wilmarth. Iowa Public Service Company appeared by its attorney, Sylvester F. Wadden, and Iowa Utilities Association appeared by its attorneys, Frederic M. Miller and Sherwin J. Markman. Defendant Wisconsin Power and Light Co. was not served with process and has not appeared in this action. Reference herein to "defendants" excludes such defendant. In conformity with the Rules, the Court makes—

FINDINGS OF FACT

The Court finds the following chronology of events is pertinent to the matters before the Court:

1. The action was commenced February 18, 1954, and seeks the recovery of $120,000,000 in treble damages for alleged violations of the federal antitrust laws.

2. On March 10, 1954, Union Electric Power Company, one of the defendants, noticed the depositions of the individual plaintiffs and others.

3. On May 16, 1955, the Court ordered the deposition of one of the plaintiffs, Harry J. Strong, the secretary, treasurer, director and general manager of plaintiff, First Iowa Hydro Electric Cooperative. In this order the Court also constrained all the defendants to participate in the deposition.

4. On June 6, 1955, the deposition of Harry J. Strong commenced pursuant to court order and under the appointment of Wayne G. Cook, as Special Master, with the prior consent of all parties.

5. On June 23, 1955, the Special Master ordered the production of the bank records of the deponent because of the commingling of funds of the corporate plaintiff in his personal account, and ordered a two-weeks' recess in the deposition to permit the defendants an opportunity to obtain and inspect such records.

6. On July 12, 1955, the deposition of Harry J. Strong recessed until July 25, 1955, to permit the Court to dispose of matters raised by plaintiffs in connection with their proposed efforts to remove the Special Master. (On July 18, 1955, plaintiffs filed a motion to remove Wayne G. Cook as Special Master, which the Court subsequently denied.)

7. On July 22, 1955, the Court ordered the deposition of Harry J. Strong to resume on August 1, 1955.

8. On August 1, 1955, the Special Master, at the request of plaintiffs, postponed to September 6, 1955, the date for the deposition of Harry J. Strong in order to give plaintiffs an opportunity to determine whether or not an appeal would be taken from the Court's order denying plaintiffs' motion to vacate the appointment of the Special Master.

9. On September 2, 1955, the Court, on its own initiative, but on behalf of the plaintiffs, ordered that the deposition of Harry J. Strong be resumed at a date later to be determined by the Court.

10. On September 15, 1955, the Court ordered that the deposition of Harry J. Strong be resumed on October 3, 1955.

11. On September 16, 1955, plaintiffs filed a motion for leave to remove their attorneys of record.

12. On September 21, 1955, the Court, having accepted the resignation of Wayne G. Cook, appointed Edward A. Doerr as Special Master. The powers accorded Mr. Doerr were intentionally expanded by the Court pursuant to Rule 53 partly because of collateral issues raised by the plaintiffs which were not connected with the pending discovery proceedings. In the same order, the Court also ordered the deposit forthwith into the registry of this Court of the sum of $2,500.00 by plaintiffs and the sum of $2,500.00 by defendants, to defray the fees and disbursements of the Special Master. This sum was duly paid by defendants.

13. On September 26, 1955, plaintiff Harry J. Strong, on behalf of all plaintiffs, filed a motion to defer the deposit. On September 27 the Court entered an order denying the motion and again ordered the deposit to be made forthwith.

14. On September 28, 1955, the Special Master, upon the informal request of Harry J. Strong, postponed the resumption date of his deposition to October 10, 1955.

15. On September 29, 1955, the Special Master ordered that the motion of plaintiffs to discharge their attorneys be heard on October 3, 1955.

16. On October 3, 1955, plaintiffs filed in the United States Court of Appeals for the Eighth Circuit a motion for leave to file petition for mandamus and injunction and for temporary stay order. This motion was denied by the appellate court on the same day.

17. On October 3, 1955, plaintiffs' motion to discharge their attorneys was heard and submitted to the Special Master. Plaintiffs defaulted at this hearing. On October 5, 1955, the Special Master nonetheless entered a conditional order of discharge.

18. On October 10, 1955, Harry J. Strong at the resumption of his deposition expressly refused to testify, although instructed so to do twice by the Special Master. On the same date defendant Union Electric Power Company filed motions to dismiss, which were joined in by all other defendants. (These motions were filed with the Special Master on October 10, 1955, and with the Clerk on October 11, 1955.)

19. On October 10, 1955, plaintiff Harry J. Strong filed an affidavit of prejudice directed against the presiding judge.

20. On October 17, 1955, plaintiffs, individually, and without acting through their counsel of record, filed various motions, including one to expunge the deposition of Harry J. Strong. On October 21, 1955, the

Court entered its order overruling the affidavit of prejudice filed by plaintiff Harry J. Strong.

21. On October 28, 1955, the Special Master entered an order striking from the court file the various motions filed individually by plaintiffs on October 17, 1955.

22. On November 18, 1955, the motions to dismiss filed by defendants on October 10, 1955 were heard and submitted to the Special Master.

23. On November 21, 1955, the Special Master entered his order finding that the refusal of Harry J. Strong to testify on October 10, 1955 was flagrant, willful and without justification or excuse and had the necessary effect of disrupting orderly procedure and hampering defendants in making their defense. The Special Master, however, ordered that the deponent be given an additional and final chance to testify and ordered his deposition to resume on December 6, 1955. The Special Master also found that the failure of all the plaintiffs to make the deposit required under the September 21 and 27 orders of the Court was flagrant, willful and without justification or excuse.

24. On November 28, 1955, certain individual plaintiffs, F. A. E. Gillmor, Harry J. Strong and P. H. Naber, filed notice of appeal to the United States Court of Appeals for the Eighth Circuit from the order of the Special Master of October 28, 1955, striking the various motions theretofore filed by the individual plaintiffs. No review of such order by this Court was ever sought by any plaintiff.

25. On November 29, 1955, the Special Master, upon the oral request of plaintiffs through their attorneys of record, delayed the resumption of Harry J. Strong's deposition until December 20, 1955.

26. On December 20, 1955, plaintiff Harry J. Strong at the resumption of his deposition again expressly refused to testify, although he was then and had been previously advised by the Special Master of the con-

sequences of such refusal. The witness stated that he would take his chances on a dismissal and adhered in his refusal to testify. The witness was informed that the defendants were invoking the sanctions permitted by Rules 37(d) and 41(b), which would result in a dismissal of the action as to plaintiffs Harry J. Strong and First Iowa Hydro Electric Cooperative.

27. On December 22, 1955, the Special Master entered his order of dismissal as to plaintiffs Harry J. Strong and First Iowa Hydro Electric Cooperative, which the Court treats as a recommendation of dismissal.

28. On December 22, 1955, the Special Master ordered the deposition of plaintiff F. A. E. Gillmor, president and director of plaintiff First Iowa Hydro Electric Cooperative, to commence on January 10, 1956.

29. On January 3, 1956, plaintiffs by their attorneys of record filed a petition to review the order of the Special Master entered on December 22, 1955.

30. On January 4, 1956, the Special Master filed his Report on the dismissal of the action as to plaintiffs Harry J. Strong and First Iowa Hydro Electric Cooperative.

31. On January 9, 1956, the Court assigned for hearing on January 20, 1956, the Report of the Special Master, plaintiffs' petition for review filed January 3, 1956, and the failure of plaintiffs to comply with the two deposit orders of the Court.

32. On January 10, 1956, plaintiff F. A. E. Gillmor at the taking of his deposition refused to testify, after being required by the Special Master to testify. Two of the defendants, orally and in the presence of F. A. E. Gillmor, moved to dismiss the action as to him upon the same grounds urged in defendants' motions to dismiss filed October 10, 1955. On the same day, all of the defendants joined in written motions

of dismissal as to F. A. E. Gillmor and First Iowa Hydro Electric Cooperative.

33. On January 16, 1956, defendants' motions to dismiss were heard and submitted to the Special Master, who entered his order of dismissal on the same date, dismissing the action as to plaintiffs F. A. E. Gillmor and First Iowa Hydro Electric Cooperative, subject to confirmation by the Court.

34. On January 17, 1956, the Special Master filed his Supplemental Report on the dismissal of the action as to plaintiffs F. A. E. Gillmor and First Iowa Hydro Electric Cooperative. On the same day the Court ordered that such Supplemental Report be heard with the other matters assigned for hearing on January 20, 1956.

35. On January 19, 1956, plaintiffs filed their exceptions and objections to the Report of the Special Master filed January 4, 1956, their petition for review of the order of the Special Master filed January 16, 1956, and their objections and exceptions to the Supplemental Report of the Special Master filed January 17, 1956.

36. On January 19, 1956, plaintiffs filed with the Court their motion to vacate the appointment of a Special Master.

37. On January 20, 1956, in open court, defendants orally moved to strike plaintiffs' motion to vacate the appointment of the Special Master and renewed their motions to dismiss the action as to all plaintiffs for failure to comply with the two deposit orders of the Court.

The Court makes the following additional findings of fact:

1. *General.*

I find that proper and timely service of pleadings, motions, orders and reports was made in all required

instances. The several motions of defendants and the orders and reports of the Special Master were served personally on each of the named plaintiffs as well as upon their attorneys of record. Plaintiffs have not objected or excepted to any of the facts stated in any of the orders or reports of the Special Master, and such facts stand unchallenged. Defendants have not sought to impose any contempt penalty upon any of the plaintiffs, but have invoked the sanctions afforded by Rules 37(d) and 41(b). I find that the attorneys of record for the plaintiffs have no interest in the subject matter of the litigation. On October 5, 1955, the Special Master entered a conditional order of discharge as a result of his hearing on October 3, 1955 on the motion of plaintiffs to discharge their attorneys of record. I find that the plaintiffs have failed to exhaust the remedies afforded them by the conditional terms of that order and have failed to seek any review by this Court of the October 5 and 28, 1955 orders of the Special Master. The October 5 and 28 orders of the Special Master were ex parte as to defendants. The plaintiffs' claim that they are unrepresented by any attorney is without merit. I find that the plaintiffs are represented by James D. France, Xavier C. Nady, James R. McManus, Allan R. Shepherd, as attorneys of record, and the firm of Haley, Doty and Schellenberg appear of counsel.

2. *Plaintiffs' Motion to Vacate the Appointment of the Special Master and Defendants' Motion to Strike the Same.*

On May 23, 1955, the Court appointed Wayne G. Cook as Special Master, following a conference with counsel for plaintiffs and counsel for several of the defendants. I find that plaintiffs have initially consented to the appointment of a Special Master.

Mr. Edward A. Doerr was appointed as Special Master by the Court on September 21, 1955, following the resignation of Mr. Wayne G. Cook. Plaintiffs'

motion to vacate the appointment of Mr. Doerr was not made to the Court until January 19, 1956, after the Special Master had issued various orders, rulings and reports. I find the plaintiffs' motion was not timely filed with the Court.

The complaint seeks recovery of $120,000,000 in treble damages and equitable relief under the antitrust laws. The period of time covered by the complaint extends from 1938 to 1954. There are ten defendants, whose separate answers pose evidentiary and procedural problems of great magnitude. The issues in this action involve engineering, financing, economic and other technical problems of vast complexity. The discovery proceedings, still in their early stages, have resulted in volumes of testimony and documents. The record discloses many difficult problems pertaining to marketability of power, project design, economic engineering feasibility, financing methods and expectations, costs of construction and power, additional and numerous expert witnesses, and other allied matters which would be the subject of extended discovery proceedings requiring continued supervision to prevent oppression or hardship to any party. The documents which plaintiffs have voluntarily produced in response to defendants' interrogatories and which plaintiffs have produced under order of Court and order of the Special Master are detailed and voluminous. For example, the transcripts of the Federal Power Commission hearings exceed 5,000 pages.

I find that the issues are complicated and that the reference was not only proper but necessary in the interests of justice. This action, peculiarly and appropriately, requires the appointment of a Special Master.

The objection of the plaintiffs to the appointment of the Special Master, insofar as it is based upon an alleged deprivation of the right to trial by jury, must be denied. Rule 53 permits such an appointment, and this action required it. In my order of January 9, 1956, I pointed out that the appointment of the Special

Master does not and cannot deprive plaintiffs of their right of trial by jury if their request therefor has been seasonably made, nor does it empower the Special Master ultimately to hear and determine the issues between the parties upon a trial of this cause. I further find that the appointment of the Special Master, Edward A. Doerr, was without prejudice to the plaintiffs.

3. *Refusal to Deposit.*

On September 21, 1955, the Court ordered plaintiffs to deposit forthwith the sum of $2,500.00 to defray fees and disbursements of the Special Master. A like sum was commanded of the defendants and was duly paid by them into the registry of this Court. On September 26, Harry J. Strong, on behalf of plaintiffs, requested a deferment of their deposit, but this was denied by court order entered September 27, 1955, and the deposit was again ordered to be made by plaintiffs forthwith. The record discloses that plaintiffs had sufficient funds to make the deposit. Plaintiffs at no time sought to avoid the deposit on the grounds of insufficient funds. None of the individual plaintiffs has tendered the whole or any part of the required deposit. I find that plaintiffs had sufficient funds to make the deposit. I find that the failure of plaintiffs to make the required deposit was flagrant, willful and without justification or excuse. I find that such failure constituted a refusal to comply with the orders of this Court and should be subject to the sanctions permitted by Rule 41(b).

In their motions filed on October 10, 1955, defendants sought, under Rule 41(b), dismissal of the action against all of the plaintiffs for their failure to comply with the deposit orders of this Court. The motions are well taken.

4. *The Refusal to Testify.*

The deposition of Harry J. Strong was begun under an order of this Court, and its resumption was ordered

both by this Court and by the Special Master. On September 28, 1955, the Special Master, upon the informal request of the witness, postponed the resumption date to October 10, 1955. On October 10, 1955, Harry J. Strong expressly refused to testify, although instructed twice by the Special Master to testify. The witness left the hearing room while one of the defendants was attempting to advise him that sanctions would be sought under Rule 37(d), should he persist in his refusal to testify. Despite such conduct, the Special Master gave the witness a final chance to testify and ordered his deposition to resume on December 6, 1955. In this order, which was entered on November 21, 1955, the Special Master found that the witness' refusal to testify was flagrant, willful and without justification or excuse and had the necessary effect of disrupting orderly procedure and hampering defendants in making their defense. The witness was and is secretary, treasurer, director and general manager of plaintiff First Iowa Hydro Electric Cooperative. The order provided that, if the witness again refused to testify, the action would be dismissed as to plaintiffs Harry J. Strong and First Iowa Hydro Electric Cooperative. The order was served on all of the named plaintiffs and on their attorneys of record. At the request of plaintiffs through their attorneys of record, the resumption date was postponed until December 20, 1955. On December 20, 1955, the witness was again present and again expressly refused to testify. He stated that he would take his chances on a dismissal of the action.

I find that plaintiff, Harry J. Strong, was secretary, treasurer, director and managing agent of plaintiff First Iowa Hydro Electric Cooperative. I find that his refusal to testify was flagrant, willful and without justification or excuse, and had the necessary effect of disrupting orderly procedure and was prejudicial to the defendants in making their defense. I find that the witness was given ample notice of the consequences of his failure to resume his deposition and was given ample opportunity to testify. On October 10, 1955, the

defendants moved to dismiss the action as to plaintiffs Harry J. Strong and First Iowa Hydro Electric Cooperative, under Rule 37(d) and under Rule 41(b). I find that the motions are well taken.

The Court order of May 16, 1955, provided that the deposition of Harry J. Strong was to proceed until completed. I find that that order and the subsequent orders of the Court and Special Master dealing with the resumption of Harry J. Strong's deposition were ignored by the witness. His conduct was contumacious, his attitude defiant, his reasons for refusing to testify invalid.

On December 22, 1955, the Special Master ordered the deposition of plaintiff F. A. E. Gillmor, president and director of plaintiff First Iowa Hydro Electric Cooperative, to commence on January 10, 1956. On January 10, 1956, F. A. E. Gillmor refused to testify, although admonished by the Special Master. Instead, this plaintiff read a self-serving statement into the record and started to leave the hearing room. Before he departed, two of the defendants, orally and in his presence, moved to dismiss the action as to him upon the same grounds urged in defendants' motions to dismiss filed October 10, 1955. The witness had been served with copies of the Special Master's order of December 22, 1955, dismissing the action as to plaintiffs Harry J. Strong and First Iowa Hydro Electric Cooperative, and he was served with copy of the Special Master's report filed January 4, 1956. He was fully advised of the consequences of his refusal to testify.

I find that plaintiff F. A. E. Gillmor was president and director of plaintiff First Iowa Hydro Electric Cooperative. I find that the refusal of the witness to testify was flagrant, willful, and without justification or excuse and had the necessary effect of disrupting orderly procedure and was prejudicial to the defendants in making their defense. I find that, under the circumstances, there was no necessity for according

this witness another chance to testify. As with witness Strong, the conduct of witness Gillmor was contumacious, his attitude defiant, his reasons for refusing to testify invalid. The disrespect which these parties exhibited toward judicial process is the proper subject of sanctions sought by defendants. On January 10, 1956, all of the defendants joined in written motions of dismissal of the complaint as to plaintiffs F. A. E. Gillmor and First Iowa Hydro Electric Cooperative. I find that the motions are well taken.

5. *The Orders and Reports of the Special Master.*

On January 4, 1956, the Special Master filed his Report, based on his orders of November 21, 1955 and December 22, 1955 pertaining to the dismissal of the action as to plaintiffs Harry J. Strong and First Iowa Hydro Electric Cooperative. On January 17, 1956, the Special Master filed his Supplemental Report, based on his order of January 16, 1956 dismissing the action as to plaintiffs F. A. E. Gillmor and First Iowa Hydro Electric Cooperative.

Plaintiffs have not objected or excepted to any of the facts stated in such orders and reports, and such facts stand unchallenged.

I find that the facts stated in the aforesaid orders and Reports of the Special Master are correct and admitted. I find that the dismissals recommended by the Special Master should operate as an adjudication upon the merits.

I sustain the aforesaid orders of the Special Master, approve and adopt his orders, Reports and recommendations, except with reference to the deposit orders of this Court, and find that the action should be dismissed as to plaintiffs Harry J. Strong, F. A. E. Gillmor and First Iowa Hydro Electric Cooperative for the willful refusal of plaintiffs Strong and Gillmor, both officers and one the managing agent of the corporate plaintiff, to testify at the taking of their depositions.

6. *Miscellaneous.*

The record in this action does not disclose that any of the five directors of the corporate plaintiff directed its managing agent or any officers to testify or made any attempt to comply with the deposit orders.

None of the individual plaintiffs and no officer or representative of the corporate plaintiff other than the attorneys of record appeared or was physically present at any time during the course of the hearing held on January 20, 1956.

I find that the interests of justice would not be served by affording plaintiffs Strong and Gillmor another opportunity to testify or granting plaintiffs further time in which to comply with the deposit orders. Those who flaunt judicial authority may do so at the minimum peril of dismissal. Courts must be equally concerned with rights of a defendant. Those rights have been prejudiced in the present action by the conduct of plaintiffs Strong and Gillmor.

The fees and disbursements of the Special Master, Edward A. Doerr, contained in the Supplemental Report filed January 17, 1956, are reasonable and are hereby approved.

The fees and disbursements of both Special Masters should be borne equally by plaintiffs and defendants. Defendants should recover all other costs.

CONCLUSIONS OF LAW

The Court makes the following conclusions of law:

1. The attorneys of record for the plaintiffs have no interest in the subject matter of this action.

2. The plaintiffs' petitions for review were heard by the Court on January 20, 1956. The relief therein sought must be denied. The exceptions and objections of plaintiffs to the Report of the Special Master filed

January 4, 1956 and to the Supplemental Report of the Special Master filed January 17, 1956, should be overruled.

3. The motion of defendants renewing that portion of their October 10, 1955 and January 16, 1956 motions to dismiss for failure of the plaintiffs to comply with the Court's deposit orders must be sustained.

4. Any objection to the appointment of Edward A. Doerr as Special Master would of necessity have to be made to the Court appointing such Special Master. The plaintiffs failed to make timely objection to such appointment and have waived objection to such appointment.

5. The appointment of Edward A. Doerr as Special Master is valid and does not infringe upon or violate any of plaintiffs' constitutional rights.

6. Plaintiffs' motion to vacate the appointment of a Special Master should be overruled. Defendants' motion to strike plaintiffs' motion to vacate such appointment should be sustained.

7. The power to impose sanctions is a necessary corollary of the power to administer justice. Apart from rule or statute, a court has the inherent power to require a deposit of security for costs or to dismiss an action as against a party who has failed to comply with an order of court. These matters are also expressly covered by the Federal Rules of Civil Procedure. I conclude that the action should be dismissed as against all of the plaintiffs for their willful failure to comply with the deposit orders of this Court.

8. I conclude that sanctions may be imposed under Rule 41 for the failure of a plaintiff to comply with court orders, and that the action should be dismissed as to Harry J. Strong under Rule 41. I conclude that the action as to plaintiff Harry J. Strong and plaintiff First Iowa Hydro Electric Cooperative should also be dismissed under Rule 37 for the failure of the

witness, as a party and as an officer and managing agent of a corporate party, to resume his deposition.

9. I conclude that the action should be dismissed under Rule 37 as to F. A. E. Gillmor and First Iowa Hydro Electric Cooperative for the refusal of plaintiff F. A. E. Gillmor, president of plaintiff First Iowa Hydro Electric Cooperative, to testify in his deposition.

10. I further conclude that the dismissals are within the inherent power of the Court.

11. I conclude that the orders and reports and recommendations of the Special Master should be confirmed, except with reference to the deposit orders of this Court, and that defendants' motions to dismiss should be sustained.

12. I conclude that the dismissals should operate as an adjudication on the merits.

ORDER FOR JUDGMENT

IT IS ORDERED, ADJUDGED AND DECREED that:

1. The action should be and is hereby dismissed as to plaintiffs, First Iowa Hydro Electric Cooperative, F. A. E. Gillmor, Carl J. Mitzner, Harry J. Strong, Harry Imel, and P. N. Naber.

2. Such dismissal shall operate as an adjudication upon the merits.

3. The fees and disbursements of Wayne G. Cook as Special Master and Edward A. Doerr as Special Master shall be assessed against and paid by the plaintiffs and defendants equally. The compensation of Wayne G. Cook was initially ordered to be advanced by defendants, but subject to final order of this Court. The fees and disbursements of both Special Masters shall be taxed one-half against plaintiffs and one-half against defendants, and

defendants shall be credited for all advancements heretofore made. The fees and disbursements of Edward A. Doerr shall be paid within thirty days of entry of this judgment. Upon failure of either party to make such payment within the time allowed, the Clerk shall forthwith issue a writ of execution in favor of the Special Master, and against the delinquent party or parties. All other costs are taxed against plaintiffs, severally.

The Clerk is directed to enter judgment forthwith.

Dated at Des Moines, Iowa, this 25th day of January, 1956.

/s/ Wm. F. Riley

William F. Riley

United States District Judge